ADMINISTRATION OF GOVERNMENT INDUSTRIES

—THREE ESSAYS ON THE PUBLIC CORPORATION

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TO
MY FATHER

Foreword

The participation by the State in industrial and commercial activities, during the 20th century, has not been a fortuitous occurrence; it is the culmination of a gradual evolution of the nature and significance of the modern State. A series of events have contributed to this development—the First World War, the great depression of the 1930's, re-armament, the Second World War, the elimination of imperial possessions, and finally the emergence of numerous new sovereign entities in Asia and Africa. Consequently, the public ownership of means of production and distribution has been expanding in every State irrespective of its political and constitutional set up. For instance, a survey of the United Nations Economic Commission for Europe, conducted a few years ago, revealed that in nearly all countries of western Europe, state expenditure in public enterprises, accounted for 15 to 25 per cent of the gross national product. The study also pointed out that the level of economic activity was strongly influenced by the manner in which the public sector was run even in a free market country.

The mere fact that big economic enterprises are publicly owned means that they are bound to be regarded as instruments for influencing the whole economy. For instance, in Britain over 25 per cent of the labour force are already public employees and 10 per cent or a little over two million of them are employees of public corporations. With a gross national income of approximately £ 3,000 million (at the time of the *Survey*) the public corporations accounted for 15 per cent. This seems to provide an impressive role of public enterprises in a country which was the champion, *par excellence*, of the doctrine of *laissez-faire*.

In recent years, the public sector has acquired special significance in less developed countries, such as India, which have been reluctant to adopt a system of absolute planned

economy and complete collectivisation after the Soviet model, without, however, leaving their economic growth purely to the automatic mechanisms of the market.

The public ownership of vital enterprises, indubitably, solves some age old problems and creates situations which are irreversible by nature but not without creating new problems. A characteristic feature of the public sector in all countries is the diversity of organisational forms. For some years now a new type of institution has been gaining ground, namely the public corporation. This is widely reckoned to be the most suitable vehicle for public undertakings. It seems proper to say that a normal public corporation is able to act with an economy and efficiency unusual in regular departments and bureaus. Of course, no public corporation can live up to high standards of driving power and versatility without being given some prerogatives essential for industrial and commercial enterprises. Yet, these public sector corporations are organs of public administration. As such they are instruments of public policy as much as the government departments under the direct control of Ministers.

Recently there has been an incessant and increasing flow of academic papers and official documents dealing with public enterprises and public corporations. But until recently the comparative study of the public corporation has made little headway. The field is so vast, the various national approaches to its problems so diverse, and the information, for all except a handful of the advanced countries, so scanty, that the individual student has been understandably reluctant to grasp this particular nettle. Consequently, comparative study of the public corporation is an imperfect and exacting discipline, whose devotees must display considerable imaginative insight as well as straightforward scholarly expertise. Dr. R. S. Arora has shown ample evidence of this.

In his first essay, Dr. Arora takes a close and constructive look at the salient contributions to the theory of the public corporation. He critically examines the contributions of distinguished authors of this century including W. F. Willoughby, Van Dorn, A. C. Pigou, J. M. Keynes, Lord Reith, Herbert Morrison, Hugh Dalton, W. A. Robson, Marshall Edward Dimock, V. O. Key, Jr.

In the second essay the author describes the maze of legal complexities which surround the device of the public corporation in different legal systems. Admittedly, "the legal status of the public corporation in the United States, the United Kingdom and India" as treated by the author is a valuable pioneer effort. There are indications in our own country and throughout the world that the responsibilities of public corporations may be further increased in the coming years. In spite of extraordinary diversities of opinion, many plans suggest that inter-governmental corporations will become a favourite tool for handling international economic problems. Therefore, lessons drawn by the author in this essay should be of particular value.

The third essay in this volume deals with the public relations of British public corporations. Emanuel Shinwell once said : "I have been talking about nationalisation for forty years but the implications of the transfer of property have never occurred to me." One of the purposes of entrusting nationalised industries in Britain (as well as in other countries) to public corporations was to keep them away from day to day politics of political parties. The British experience seems to suggest that an attempt to "keep politics out of politics" was bound to be frustrated because the immunity of the public corporation in a liberal democratic political system could be tolerated only to a limited extent.

These essays should be of great utility to all interested in the theory and practice of public ownership particularly to Members of Parliament, the administrative ministries, boards of public corporations, jurists and the enquiring members of the public at large in India as well as in other countries where the device of the public corporation is being increasingly employed.

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J.N. KHOSLA
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R. S. ARORA

Introduction

The three essays which follow are attempts to appraise the relationship between government and business, with particular reference to the public corporation. It is widely acknowledged that no institution has ever developed so rapidly, the world over, during the twentieth century as has the public corporation. The proliferation of this device is the direct outgrowth of the functional expansion of all governmental activities. To help accomplish their new functions governments have resorted extensively to the innovation of the government corporation, because it appeared to offer almost unlimited possibilities of growth in government activities, without consequential paralysis from excessive complexity.

Yet all is not well with the public corporation. It has inspired a literature which is replete with contradictions and strange paradoxes. The more extensively the public corporation has been used, the greater has become the confusion about its distinctive purpose and underlying principles. On the one hand, it continues to be a widely used administrative device, as is reflected in President Truman's statement in his 1948 Budget message[1] that "experience indicates that the corporate form of organisation is peculiarly adapted to the administration of government programmes which are revenue producing, or at least potentially self-sustaining, and involve a large number of business-type transactions with the public";[2] on the other hand, the distinguishing marks of the corporate device are gradually disintegrating. Consequently, the public corporation as a definite and specialised form of administrative institution may gradually

[1] *Vide* The Budget of the United States Government for the Fiscal Year Ending June 30, 1948, p. 61.

[2] For a similar statement see W.A. Robson, *Nationalised Industry and Public Ownership* (London, 1960), p. 493.

disappear. This latter fear is confirmed by Professor Dimock. He says : "In non-metaphorical language, it might be suggested that if the trends of the past fifteen years continue, in the United States all that may remain of the Government Corporation is its name and not its substance."[3] Similar doubts have arisen quite recently in many other countries, which have led to controversies concerning the appropriateness[4] of this institution as an administrative device.

The situation is really strange and subtle. There is a remarkable unanimity on the basic utility and necessity of the institution of the public corporation; at the same time, the public board has not been able to find its rank and status in the constitutional and administrative hierarchy of the State. Indubitably, this institution has in general the capacities that are essential for a large scale industrial and commercial organisation : for example, it can function on commercial lines and operate in business relations as a distinct juristic person; it can acquire title to property, assume debts; sue and respond to suit in court; establish revolving funds, etc. The first essay included in this slim volume shows that the emergence and growth of this institution seems to be a historic necessity at the present stage of society's development. Some outstanding merits of the public corporation over the traditional Government Department have been discussed in detail. At the same time, it can scarcely have escaped notice that uncertainty even as to its distinct underlying principles seems to grow, rather than diminish, as the public corporation becomes maturer and more extensively used. Various reasons can be given for this paradoxical situation. At this moment, the principal, indeed, the desperate, task of the public corporation is to maintain itself as a unique entity; its next, to improve and refine itself.

The basic reason for separating the commercial and industrial activities of governments from their political, administrative and house-keeping functions is the belief that these enterprises ought to be evaluated by different standards, and that their

3 *Vide* M.E. Dimock, "Government Corporation ; A Focus of Policy and Administration," I, *American Political Science Review*, 1949.

4 *Vide* H.R.G. Greaves, *The Civil Service in the Changing State* (London, 1947), p. 106.

success depends on a different set of incentives and pressures. They should be capable : of meeting their working expenses; of paying interest on capital; of providing for the loss of capital due to wear and tear and obsolescence; of writing off bad debts, of committing capital as it is thought best and appropriate; of taking quick decisions on important and urgent matters, especially with regard to prices and services, and industrial and public relations matters. These reasons make a convincing case for a high degree of independence of Boards from Government controls. But it is also widely accepted that public corporations, in view of their size and magnitude, and because of their expansion plans, investment and employment policies, tariff structure, etc., influence the whole economic structure of the State, hence the nation must have some final power of control.

The problem of achieving a fair balance between the degree of autonomy essential for an effective and efficient administration of public enterprises and the amount and modes of controls required to keep the centre of gravity of the public sector in the centre is an exceedingly difficult and delicate one. It is out of question to evolve a ready-reckoner on such a subject, applicable to all public corporations everywhere. The importance of enterprises varies from case to case, and from state to state. For instance, in Britain industries have been transferred from private owners to the public sector. Such industries have inherited certain problems which are peculiar to them and for which the existing Boards are not responsible. Such problems are not shared by Indian public corporations which are, in most of cases, entrusted to build or to run newly built enterprises. Such Indian public corporations have problems of their own which are altogether different from those inherited by British Boards.

Nevertheless, there are many issues which are common to the form of the public corporation, which need to be settled in principle. For instance, the relationship between the Boards and Ministers; between the Boards and Parliament; the status of the Boards in the courts, etc.

The second essay is on the "legal status of the public corporation". In nearly all instances there has been conferred upon public corporations the power to sue and the liability to be sued. Apparently such provisions solve certain problems,

but many others are created. For this power and liability flow normally from its corporate nature and do not determine other questions including that of the relationship of the corporation to the sovereign. Consequently, judicial action against the Boards has not always been free from ambiguity. The liability of the Boards in tort is not clear. In statutes creating public corporations, say, in the United States, Britain and India it is scarcely mentioned whether they are servants or agents of the sovereign. In the absence of such statutory clarity, the attitude of the courts, which would be of great assistance, is rather unfortunate and baffling. The case law on the subject is scanty and inconsistent, which does not help much in reaching any definite decision. The cases involving the legal status of the Boards have been classified into inaccurate pigeon-holes. Various theories of the legal status of the public corporation have been examined in the second essay.

The existing pattern of statutes on the subject suggests that at the time of creating these Boards, legislative bodies themselves did not have any very clear idea of the exact status which these Boards ought to be assigned in the administrative hierarchy. Nor did they have in mind the exact legal status of these Boards. We think the time ripe to have a serious stock-taking of the whole situation, so as to deduce certain principles from experience.

In the third essay I have discussed political aspects of the public relations of the British nationalised industries. In recent British political history, the innovation known as the public corporation is variegated not so much because the administrative experts disagree as to principle and process, but because, being at the centre of the controversy over private versus public ownership, it has been treated, naturally enough, as a means and not an end in itself. Once explaining the basic problems of the public corporation Marshall E. Dimock quite rightly said: ". . . administrative formulas and management principles are rarely, if ever, capable of immunization against group pressures and public policy controls, which bend administration to their own designs, sometimes in conformity with what the impartial experts consider sound principle and practice, but just as often in knowing disregard of such considerations and in a determined effort to support their own interests and economic viewpoint."

My study of this subject suggests that if anyone is inclined to think of the public board as a quasi-autonomous entity capable of practical dissociation from the field of pressure groups and public policy, he should merely study the campaigns of political parties and of organised groups launched preparatory to general elections since the war !

These essays are based on my research for the degree of Ph.D. at the London School of Economics and Political Science from 1958 to 1961. Since then I have published some papers on different aspects of the Public Corporation in *Public Law*. After joining the Indian Institute of Public Administration in April 1967 I was given the opportunity of reorganising my research work on some other important aspects of the public corporation. I was particularly encouraged by Dr. J. N. Khosla, Director of the Institute, to undertake this task. For this I shall remain indebted to him.

I
The Theory of the Public Corporation: A Critical Appraisal

I

The Theory of the Public Corporation: A Critical Appraisal

". . . the attributes which marked the earlier federal corporations and made them representatives of a distinctive type of administrative organisation have been disappearing before our eyes, like the Cheshire cat. Soon there may be nothing left but a smile to mark the spot where the Government Corporation once stood."[1]

—C. Herman Pritchett

"Cats are reputed to have nine lives."[2]

—Marshall E. Dimock

Common reasons are advanced for the use of the public corporation in various parts of the globe, yet uncertainty as to the distinctive purpose and underlying principles of this institution seems to grow, rather than to diminish, as this device becomes older and more extensively used. In some parts of the world, it is observed, the public corporation is variegated and sometimes hardly distinguishable as a self-contained entity, mainly because, being at the centre of controversy over private versus public enterprise, it is treated, naturally enough, as a means and not as an end in itself. Yet there is every indication that in view of the increasing scope, magnitude and complexity of

1 C. Herman Pritchett, "The Paradox of the Government Corporation", *Public Administration Review*, 1941, p. 389.

2 Marshall E. Dimock, "Government Corporations: A Focus of Policy and Administration, I", *The American Political Science Review*, 1949, p. 902.

the functions that are being undertaken by governments everywhere, public corporations will be called upon, in the times ahead, for additional, and perhaps even more strategic tasks. It is the purpose of this essay to assess the value of the fundamental principles of the public corporation.

I

The theory of the public corporation finds its earliest expression[3] in one of the articles of W.F. Willoughby, published in the *Political Science Quarterly* (Vol. XXXII, No. 4, December 1917)[4]. Inspired by the successful working of British and American colonial policies which were based upon the idea of delegation of substantial administrative and financial autonomies to their respective colonial territories, Willoughby recommended the device of what he called the 'holding and subsidiary corporation' form of organisation for the operation of public enterprises to relieve the national government and Congress to a considerable extent of the ever increasing scope and variety of functions that were being imposed upon them. Realising that both the Executive and Congress have neither sufficient time nor appropriate qualifications to administer certain of their special services, particularly all of the revenue-producing enterprises of the government, he suggested that the administration of such enterprises be entrusted to distinct subsidiary corporations to which Congress would stand as a holding corporation.[5]

3 Marshall E. Dimock in a footnote of his article : "Government Corporation ; A Focus of Policy and Administration, II", *The American Political Science Review*, 1949, p. 1163, pays tribute to W. F. Willoughby who, he also believes, deserves the honour of first laying the foundation of the corporate device.

4 "The National Government as a Holding Corporation : The Question of Subsidiary Budgets". Also see W. F. Willoughby, *Principles of Public Administration* (Chapter : "The Advantages of the System of Holding and Subsidiary Corporation)" (Washington, 1927).

5 Willoughby explains his logic as : "A study of the problem of colonial government and of the experience of the various nations having colonial systems, in respect to the policies pursued by them in the administration of the affairs of their dependencies, shows that no greater mistake can be made by the central government than to attempt itself directly to manage the affairs of such territories or to refuse to give to them substantial autonomy in respect at least to their financial affairs. In no small degree the success of Great Britain and the United States in the

While discussing the nature of such subsidiary corporations he explained :

> Essentially this means that each such service will be given a legal, administrative and financial autonomy. Each will have its organic act, or charter, providing for its creation and defining its jurisdiction, powers and duties ; its board of directors ; its directing staff and subordinate personnel; its own plant, equipment and other property which it will possess in its own name ; its own revenue and expenditure system, its distinct accounting and reporting system separate from that of the general government ; its own well defined sphere of activities. Each in a word, will have all the characteristics of a public corporation.[6]

Of course, each corporation will have its own distinct budget, the same being approved by the Central Government and Parliament. He further added that the members of the corporation's board presumably will be selected with special reference to their qualifications for their positions. The legal relationship between these corporations and the general government will be much the same as that between an agent and a principal. There will be no abdication of authority on the part of Congress : rather it will purely be one of the delegation of some authority to a subordinate body without divesting itself of ultimate responsibility. The corporation would be required, he believed, to submit to the government complete and detailed account of their working. Willoughby claimed the following advantages for the proposed institution :

Firstly, the most important result would be the immediate relief of Congress from the burden of having to concern itself with the great mass of details, many of which were of a purely

management of their colonial possessions, in comparison with that of other nations, is due to the greater extent to which this policy has been pursued by them. . . . It will, of course, not escape notice that in these cases we have an example of the use of the principle of subsidiary corporations for the purpose of effecting a distribution or delegation of governmental powers territorially, while what is proposed in this paper is the application of this principle to the distribution or delegation of powers functionally. It is this distinction which gives to this proposal its novel character."

(See W. F. Willoughby, "The National Government as a Holding Corporation", *Political Science Quarterly*, No. 4, 1917, pp. 519-520.)

6 W.F. Willoughby, *op. cit.* p. 507.

administrative and technical character, under which it laboured in seeking itself directly to determine precisely how each of these highly specialized services would be organised, manned, equipped and operated. Willoughby believed: "This relief will manifest itself especially in respect to the annually recurring necessity that Congress is now under of considering in detail the appropriations that shall be voted for the support of the government. . . . Under the proposed plan the greater part of this burden will be performed by the boards of directors of the several subsidiary service corporations."

Secondly, the proposed plan of organisation would promote in a very material way the exceedingly desirable end of taking the purely business and technical services of the government outside of the domain of politics. The mere fact of separating the organisation and operations of these services from that of the general organisation and operations of the government would tend to emphasise their non-political character, and make it easier to resist political pressure in respect to both their work and their personnel.

Thirdly, the board of directors would exercise their duties continuously and with a freedom of action that was impossible for Congress. Congress was in session only part of the time. While it was in session, only a small part of its time could be devoted to the affairs of any one service. When it did act it could do so only through the laborious process of legislation. The board of directors of a service corporation was, so to speak, in continuous session. In reaching decisions it could avail itself of the knowledge and judgement of the working staff of the service, to a degree that Congress found it difficult to do. Decisions once made could be promptly amended or revised as experience dictated. Action which often required months or years to secure from Congress could be taken at once. Flexibility would replace the rigidity which characterised the existing system of congressional direction of details.

Fourthly, each service entrusted to a corporation would be put in a position where it could work out and operate an accounting and reporting system adapted to its special needs. It was of the utmost importance that the government should so keep the accounts of its activities of business character that accurate comparison of its costs with those of corresponding or

analogous work being done under private auspices could be established. Without such knowledge, it was impossible for Congress and the public to determine the efficiency with which these operations were being carried on, or to frame policies in respect to the extension or curtailment of work and the entering of new fields of activity.

Fifthly, the enterprises entrusted to public corporations would offer a special career to all of their personnel. If competent men were to be found for technical positions, and retained in them, it was imperative that such men were not only paid an adequate compensation, but were afforded an opportunity for advancement in their chosen profession. This could be done only when the technical personnel of each corporation was carefully classified and a satisfactory system devised and operated.

Sixthly, the giving to each of proposed corporations a distinct life of its own would promote the development of an *esprit de corps* and interest in the enterprise on the part of its personnel. All, from the highest officer to the lowest employee, would know that any benefits resulting from increased economy in the expenditure of funds, from increased efficiency in the performance of duties, or from securing increased revenue, would accrue directly to the enterprise instead of to a general organisation and treasury in which it had but little direct interest. Under the proposed plan all of corporation's demands will be demands upon its own funds and all revenues will accrue to its own treasury. The incentive to increase revenue receipts and to keep down expenses, to practise economy, and generally to conduct affairs in an efficient manner, could not but be far greater than it was under existing conditions.

Finally, no small advantage of the proposal was the extent to which it would promote or facilitate the course of civil-service reform and the principle of putting the business branches of government upon a purely business basis.

It is, really, very interesting to note that Willoughby presumed as early as 1917 that his plan would create a number of problems when executed. He thought that among these the most important will be that of fixing the precise relation of the boards of directors of service corporations to Congress.[7] These

[7] W.F. Willoughby in *Political Science Quarterly, op. cit.* p. 517.

services would also raise the interesting question of the relations that should exist between the several service corporations and between them and the other services of the government.[8] Above all, he recognised that great difficulty would be encountered in getting Congress to be willing to surrender its present immediate control over the operations of these services.[9]

The public corporation might not be an entirely new institution but its modern use is quite new both in nature and significance. The credit goes to W.F. Willoughby who first laid the foundation of the theory of the public corporation. It is not the Crawford Committee on British Broadcasting (1926) which coined the term 'Public Corporation' as is generally believed[10] for it was coined by Willoughby as early as 1917. His approach towards the institution of the public corporation seems to be quite original. He mentions almost all the characteristics of a modern public corporation. It is correct that he does not go so far as some of the later theorist of corporate device.

However, Willoughby's analysis seems to suffer from two defects. Firstly, his analogy that the public corporation is like a joint stock company (subsidiary corporation as he generally calls it), and that the legislature is like the board of directors is not entirely appropriate. While explaining his theory, he mentions that each such corporation will have its own board of directors, the members of such boards being selected with special reference to their qualifications. Further, while discussing the merits of such boards over Congress, he states that they will have but one distinct class of duties (which nowhere does he explain) to perform whereas members of Congress are called upon matters of wide range.[11] His analogy if taken through and through would, and actually did, put the public corporation's own board of directors, for all practical purposes, in a very weak position. So

[8] W.F. Willoughby, *op. cit.* p. 516.

[9] *Ibid.* p. 518.

[10] D.N. Chester of Oxford University finds that this term was first found in the Report of the Crawford Committee on Broadcasting (Cmd. 2599, 1926); see D.N. Chester, "Public Boards", *Political Studies*, 1953, p. 34. Also see *The Times*, London, January 20, 1947; W. Friedmann (ed.) *The Public Corporation* (Toronto and London, 1954) p. 163.

[11] W. F. Willoughby, *op. cit.* p. 513.

much so, that in the United States later on, suggestions were made from some quarters that there was even no need for a public corporation to have a board of directors. As a matter of fact, only major matters of policy are determined by Parliament and sufficiently enough of policy matters—of course, relatively less important—have always been left for the corporation's own board of directors to decide according to the situation. Ignoring all these factors, and perhaps influenced by Willoughby's analogy later on, even the Hoover Commission on 'Federal Business Enterprises' recommended in one of their reports that "where boards or part-time boards are established, they should be wholly advisory and be appointed by the President."[12] This recommendation led to a very serious controversy, as to whether the boards of public corporations should be effective or advisory in nature, which does not seem to have been resolved so far.

The second drawback in Willoughby's contribution is that he nowhere mentions the position of the Executive Head and Executive Departments with relation to such corporations. He states that each such corporation will be accountable to Congress and 'each such subordinate corporation shall keep an account of its financial and other operations and make report annually regarding them, to the end that Congress shall always be in a position to know how affairs are being conducted by its agents.'[13] He eliminates the President, perhaps deliberately, since constitutionally the President of the United States possesses no administrative authority and the line of authority runs directly from the administrative service to the legislature, except where the latter has expressly provided otherwise. Anyhow, this omission in the plan led to a greater discomfort culminating in an effort on the part of the Executive to get every corporation integrated with one or other of the government departments.

[12] Commission on Organisation of the Executive Branch of the Government, Report on Federal Business Enterprises (Government Printing Office, 1949). Also see "Some Problems in the Organisation of Public Enterprises in the Industrial Field : A United Nations Seminar held in Rangoon from March 15th to March 26th, 1954", United Nations Technical Assistance Administration, New York, ST/TAA/M/7, 1954, para 17, pp. 9-10.

[13] W. F. Willoughby, *op. cit.* p. 519.

For instance, the Government Corporation Control Act of 1945 placed all such institutions under specialised budgetary and accounting controls of a special nature.[14]

The theory of the public corporation was further developed systematically by Van Dorn in 1926.[15] Some additional features which he considered to be the characteristics of the public corporation need to mention here.

He considered that the public corporation possessed three financial advantages over its administrative predecessors (*i.e.*, the Department) : its fluid capital serving as a reservoir on which it could draw for all expenditures without the restrictions and delays of the normal appropriation powers; its borrowing power enabling it to obtain credit in emergencies; and its freedom from the restrictions of government auditors and accountants. According to Van Dorn, the autonomy of contract, the commercial purchasing procedures and the liability to sue and be sued in the courts of law were the other essential attributes of the public corporation.

Van Dorn was helped by his studies of the practical working of many public corporations in the United States, which were created under the emergencies of the First World War.

In England after the First World War, the principal advantages of the public corporation as an agency for public control and public operation of large scale monopolies were discussed by Professor A.C. Pigou.[16] Pigou, in his *Economics of Welfare* made out a logical and penetrating case for state intervention in industries of a monopolistic character. He considered the inherent disadvantages of traditional political institutions (*i.e.*, municipal and national representative assemblies) as organs for the control or the operation of monopolistic business enterprises, and pointed out that these bodies were primarily set up for purposes quite other than that of intervention in industry. Consequently, there was little reason to expect their members to have any special competence for such a task. Further, the

[14] For detailed comments and explanation of this Act, see V. O. Key, "Government Corporations", in F.M. Marx (ed.), *Elements of Public Administration* (New York, 1946), pp. 246-255.

[15] Harold Van Dorn, *Government-Owned Corporations* (New York, 1926).

[16] A. C. Pigou, *The Economics of Welfare* (London, 1920), Chapter XVII, Part. I.

fluctuating politics of a national government or of a town council was a serious handicap. The fact of variable membership might lead these bodies into actions which were based on short view—views bounded by the next general election and not extending to the more durable interests of the community. Pigou also considered that governmental areas being determined by non-commercial considerations were often likely to prove unsuitable for intervention with the working of an industry. Finally, the regular governmental agencies, insofar as they were elective bodies, were liable to injurious forms of electoral pressure.[17]

Pigou, however, felt convinced that all these disadvantages could be obviated if a semi-autonomous type of Commission were to be used as an administrative device for the management of enterprises of a monopolistic character.[18] He held that the members of such commissions could be specially chosen for their fitness for their task, that their appointment could be for long periods, that the area allotted to them could be suitably adjusted, and that their terms of appointment could be framed so as to free them in the main from electoral pressures. Pigou finally concluded that modern developments in the structure and methods of governmental agencies have fitted these agencies for a degree of beneficial intervention into industry which would not have been justified in earlier times.[19]

In 1926, the concept of the public corporation obtained substantial support from J.M. Keynes.[20] Keynes noticed a tendency for big enterprise to socialise itself. He argued that when the great corporations attain a certain size and age they tend to approximate to the status of public corporations, rather than to that of individualistic private enterprise.[21] Keynes recognised the need for government interference in those services which were "technically social,"[22] particularly for the control of savings and investments, the business cycle, and the development

[17] A.C. Pigou, *op. cit.* pp. 397-398.
[18] *Ibid.* p. 398.
[19] *Ibid.* p. 399.
[20] J.M. Keynes, *The End of Laissez-Faire* (London, 1926).
[21] *Ibid.* pp. 42-43
[22] Keynes did not explain anywhere what did he mean by "technically social".

of a national population policy.[23] He held that the battle of socialism against unlimited private profit was being won in detail hour by hour. He concluded his essay with the remarks: "The full advantage of the natural tendencies of the day must be made; semi-autonomous corporations must be preferred to organs of the central government for which Ministers of State are directly responsible."[24]

It may be said that Keynes was perhaps rather sanguine about the automatic replacement of the profit motive by one of social service in the private sector of economy. This is not within the scope of the present study: what is relevant is his view that the public corporation formed the only suitable agency to which socialised enterprises could be entrusted for efficient management. He did not, however, go into any further details of the device which he so warmly recommended.

After the establishment of the British Broadcasting Corporation in 1926, the Royal Institute of Public Administration sponsored several seminars, attended by leading politicians and first-class civil servants, to discuss problems of management in public undertakings. The participants, quite often, made impressive contributions; particularly they brought out the choice between administrative regulation, which tended to fetter and divide management and responsibility, and the use of the corporate device, where the standards and protections to the public interest were inherent, or at least aimed to be.[25] These seminars contributed to the growth of a whole new body of knowledge and theory, with a literature and a terminology of its own.

In 1933, a notable contribution to the theory of the public corporation was made by Mr. (later Lord) Herbert Morrison.[26] In his book *Socialisation and Transport*, he put forward a

[23] Keynes, *op. cit.* p. 46.

[24] Keynes, *op. cit.* p. 45

[25] *Vide* Right Hon. Sir Neville Chamberlain, Sir H.N. Bunbury, J.H. Broadley and E. Bevin, "The Management of Public Utility Undertakings", *Public Administration*, April, 1929, pp. 103-132; Sir Geoffrey Clarke, Sir John Reith and C.E.R. Sherrington, "Business Management of the Public Services", *Public Administration*, January, 1930, pp. 10-33; Sir Josiah Stamp, "Departmentalism and Efficiency" *Public Administration*, July, 1932, pp. 220-231.

[26] Herbert Morrison, *Socialisation and Transport* (London, 1933).

practical theory for the administration and management of socialised industries. Morrison held that in order to enable a socialised industry to be self-supporting and economically successful, it must be freed from political interference, from class interests and from workers' control. He applied this theory primarily to the London Passenger Transport Undertakings, and for that purpose he had to lay aside much of the "creed and dogma" so often predominant in controversial writings. His principles relating to industrial organisation through the public corporation can be summarised as follows:[27]

(i) A selected industry should be consolidated under a single, undivided and unified public ownership, having the form of a public corporation.

(ii) The corporation should be a public concern, entrusted with the competent conduct of the undertaking committed to its charge.

(iii) Its officers should regard themselves as the high custodians of the public interest, and not as the instrument of this or that private or sectional interest.

(iv) The essential qualifications for membership to the Board of managers of the corporation should be competence and loyalty to public interest.

(v) The staff and employees of the Board should not be civil servants (appointees of the State) but appointees of the Board in its corporate and commercial capacity. The fixing of salaries should be free from Treasury control.

(vi) The Board should have autonomy and freedom of business management.

(vii) A "consultative council" should be created for the purpose of providing advice and criticism. The councils should be composed of representatives of State Departments, local authorities, labour, federation of industries, etc.

Morrison insisted that the members of a Board should be appointed solely for their ability to fill the position, and not as the representatives of shareholders or of labour. On this point, he had to part company from his trade union colleagues who

[27] Herbert Morrison, *op. cit.* pp. 150-170.

advocated direct representation of work-people on the Board. Morrison also rejected the syndicalistic pronouncement: "that in a completely socialistic state the running of industry would be by the people within the industry." He maintained and elaborated these views in his later writings which appeared after the Labour Government's post-1945 period of office.[28]

Herbert Morrison's theories were supported by Hugh Dalton. In a book published in 1935, Dr. Dalton discussed the urgency of parliamentary reform and of the extension of economic planning.[29] Although his concern was more with socialisation than with the administrative problems of socialised industries, yet he explicitly stated that 'direct administration of socialised industries by a Minister through a Government Department is an old-fashioned form of socialism, not a suitable model for new socialised undertakings'.[30] He recommended the agency of the public corporation for the management of socialised enterprises and especially stressed the following financial aspects of this institution:

(i) There must be no element of private profit, in the sense of the participation by private investors in any surplus realised by the undertaking.

(ii) Payments to private investors, in respect of assets taken over when the corporation is formed or of loans raised afterwards, must carry no control over the socialised undertaking by the recipients of such payments, not even the nominal control exercised by shareholders in a joint stock company.

(iii) In general, the ideal arrangement is that as regards extensions and improvements a public corporation should be self-supporting, that its surplus should be sufficient, not only to pay for all its own developments, but also to make a contribution to the national revenue and that its budget should be burdened with no interest payments to private individuals.[31]

While elaborating his last point, Dr. Dalton said: "Neither

[28] *Vide* Herbert Morrison, *Government and Parliament: A Survey from Inside* (London, 1954), Chapter XII.

[29] Hugh Dalton, *Practical Socialism for Britain* (London 1935).

[30] *Ibid.* p. 95.

[31] Dalton quoted the example of the B.B.C. which could achieve this ideal.

payments for interest and sinking fund, nor for wages and salaries at a proper level, are to be regarded as 'first charge'—either in preference to the other—on the corporation's revenue. Both sets of payments are necessary charges, which the corporation must meet out of the sale of its goods or services. If it fails to balance its budget, it must look for assistance to the State. But the State, if such a situation arose, would be entitled to make a searching examination into the affairs of the corporation, and to prescribe remedies for any inefficiency which might be disclosed."[32]

On the whole, it can be said that Dalton was also speaking for the British Labour Party since similar proposals had appeared previously in the Party's official document: *For Socialism and Peace*.[33]

The first serious attempt to investigate all the leading examples of the Boards and Commissions created in England since the appearance of the Port of London Authority (1908) was made by Dr. William A. Robson in 1937.[34] His book included nine separate contributions made under his editorship with a chapter of critical commentary upon some of the main features of the British public boards as they existed at that time.

Robson examined some of the complex technological problems involved in the operation of public enterprises. He stressed that 'the need for a spirit of boldness and enterprise, the desire to escape from the excessive caution and circumspection which day-to-day responsibilities to Parliament necessitates, the recognition that the operation of public utilities and industrial undertakings requires a more flexible type of organisation than that provided by the Whitehall department', had led to the device of the more or less autonomous public concern. At the same time he emphasised that there was need for strengthening public control over major items of policy. To that end he urged that the appointments of the members of all such Boards should be made by Ministers. He strongly disapproved the expedient of a body of appointing trustees, to which resort was had in the final stages of the Bill setting up the London Passenger

[32] Hugh Dalton, *op. cit.* p. 98.

[33] *Vide* Labour Party, National Executive Committee, *For Socialism and Peace* (1934).

[34] W.A. Robson (ed.), *Public Enterprise* (London, 1937).

Transport Board, and which he condemned as "absurd".

Robson held that there was no need for day-to-day supervision over the affairs of corporate boards, but he thought that Parliament should have opportunities for regular inquiry and detailed discussion on the policy and performance of the various services entrusted to the new type of public boards. To support his views on specific accountability of the public corporations, he argued : "Democracy at one remove may be a desirable objective in the day-to-day operation of these highly technical services, but it should not be at more than one remove, and ministerial control over the large scale plans and general lines of policy is essential just because the public boards are left free to work out the detailed application of these plans in their own manner."[35]

While stressing the importance of judicial controls over public boards, Robson proposed : "Since the political control which is exerciseable over the public service boards is comparatively weak, it is desirable that judicial control over their activities should be strengthened, and be made, indeed, much stronger than it is in the case of an ordinary department subject to full ministerial responsibility to Parliament . . . The need for a system of administrative courts has grown apace with the emergence of each of the public boards described in these pages."[36]

Recently Robson has produced a comprehensive work on this subject in which he has not only elaborated his earlier theories and conceptions, but has also offered a number of answers to the various practical problems which confront the public corporations in Britain.[37]

Having examined some of the outstanding contributions to the theory of the public corporation, it would be appropriate to discuss, at this stage, the attitude of organised British political parties towards this institution. It is a matter of considerable significance that the three principal political parties —Conservative, Labour and Liberal—are in general agreement on the desirability of the public corporation in principle.

Dr. Gordon said : "The Liberal Government of 1908 was

[35] W.A. Robson, *op. cit.* pp. 377-379.
[36] *Ibid.* p. 382.
[37] W.A. Robson, *Nationalised Industry and Public Ownership* (London, 1960).

so fascinated by the success of the representative public trust in Liverpool that when reconstitution of the administrative machinery for the London metropolitan port was under discussion at the beginning of this century a similar body was advocated."[38] Later on, in 1928, the Liberal Industrial Enquiry found weighty arguments for requiring public undertakings to be managed in a form analogous to that of joint stock companies, the capital of which was to be owned and the directors appointed by the State.[39] In another publication of 1934, the Liberal Party especially supported the innovation of the public corporation as an agency to conduct government undertakings.[40] It was held that 'the administration of a nationalised service ought to be kept free from the pressure of politics, by being placed under the control of a statutory commission, not working for profit, and not exposed to constant political interference, but administering the concern on purely business principles'.[41] The Liberal Party found that 'that method had the further advantage of not turning the workers of such concerns into direct employees of the State, and, therefore, of not involving the State in conflict with the workers in case of disputes.'[42]

The Conservative Governments during the inter-war period had already resorted to the institution of the public corporation for the administration of Electricity Generation and Transmission (1926), Broadcasting (1926) and London Passenger Transport (1933). The Conservative's selection of a corporate authority for electricity generation and transmission was mainly based on three principles:[43] (i) a minimum of state control; (ii) a minimum of state interference, either through the commissions, or the Minister, or arbitrators; and (iii) a maximum of freedom allowed to existing undertakings. They believed that 'corporate public concerns will be commercial concerns and their commercial discretion will be absolutely unfettered'.[44]

[38] *Vide* L. Gordon (in W.A. Robson, (ed.) *Public Enterprise*), 1937 pp. 16-17.
[39] Liberal Industrial Enquiry, *Britain's Industrial Future*, 1928, pp. 76-77.
[40] National Liberal Federation, *The Liberal Way, 1934.*
[41] *Ibid.* p. 170.
[42] *Ibid.* p. 170.
[43] House of Lords Debates, Vol. 65 (1926), Cols. 741-42.
[44] House of Commons Debates, Vol. 198 (1926), Col. 1698.

It is, however, strange that the Conservative Prime Minister in 1926 was reported to have said that any industry so entrusted to a public board should not be treated as nationalised.[45] The London Passenger Transport Bill of the first Labour Government was radically modified by the National Government in 1933 in order to bring it into line with the principles explained above.

The public corporation's greatest appeal has been to leaders of socialist thought who expected to secure through this agency 'full scope for individual initiative and business experience, freedom from needless red-tape, the utmost possible elasticity and decentralisation compatible with the efficiency of the service, and, subject always to final control by the representatives of the community, the association of various grades of workers, both managerial and manual, in the conduct and administration of their respective industries.'[46]

During the 1930's there was an active exchange of views between theorists of the public corporation in Britain and the United States.[47] In 1935, Marshall Edward Dimock's statement of the principles underlying public corporations further elaborated much the same points as those stated by Willoughby and by some of the earlier writers. He, however, stressed the importance of the board-general manager relationship. He emphasised the need for an active board of directors to complete surveillance and ultimate control over the management, and also stressed that the board of directors should not interfere with the detailed management of the corporation. The internal management and administration of the corporation should be left to the general manager.[48]

The study of the mid-thirties should be of extraordinary significance to this essay. Until this stage there was a kind of general agreement on the principal characteristics which marked the public corporation and made it a valuable device for the administration of public enterprises. The advocates of

[45] House of Lords Debates, Vol. 65, Col. 775; also see House of Lords Debates, Vol. 86, Col. 928.

[46] *Vide* Labour Party, *Labour and the Nation* (1928), pp. 24-25.

[47] M.E. Dimock's letter to the author of this essay, August 20, 1961.

[48] M.E. Dimock, "Principles Underlying Government-Owned Corporations", *Public Administration*, 1935, p. 58.

the corporate device considered that there was a norm to which individual corporations were expected to conform, within limits, and from which deviations could be measured. During the thirties, in some countries, the institution of the public corporation was found in a trying situation. It was realised that all was far from well with this new device.

The situation can be studied from two points of views. *Firstly*, some of the problems must have been genuine. Inadequate statutory provisions and diversity of pattern in public corporations were bound to create some problems of a constitutional, legal, political and administrative nature during their practical workings. *Secondly*, the rapid growth of a new institution was bound to create some reactions on other existing institutions—political, economic and administrative. It is in such situations that new pressure groups[49] are born and old ones feel like becoming up-to-date. After all, no institution which possesses certain vested interests or which commands certain powers extends ready recognition to new institutions.

The study of Oliver P. Field's contributions seems to be quite important from the first point of view as set out above. While writing in 1935, Oliver Field stated : "Lack of any conscious plan in the establishment or utilisation of the various types of corporations and their relationship to government, makes it difficult to appraise either present or future legal status."[50] In view of all the problems created by various public corporations during their functioning, he suggested : "Congress should enact a carefully drawn statute under which all corporations federally owned and operated should be incorporated . . . These statutes should cover the important phases of organisation, control, powers, finance, position in the government and should regulate some of the more troublesome phases of substantive law that are involved in their operations."[51] "Great difficulty" he felt, "exists in determining under present law, whether the government stands in the position of a shareholder to the

[49] "Pressure Groups" mean those organised groups which possess both formal structure and some common interests in so far they seek to interfere with the process of government.

[50] Oliver P. Field, "Government Corporations : A Proposal", *Harvard Law Review*, 1935, p. 780.

[51] *Ibid.* p. 782.

corporation, or whether it is the principal and the corporation the agent."[52]

Oliver P. Field's proposals were quite appropriate and opportune, but unfortunately no serious thought was given to standardising the fundamentals of the public corporation. Perhaps those who were concerned with this task did not take it seriously. On the other hand, there seems to be a good deal of evidence available in later contributions which support the second point of view.

C. Herman Pritchett, in 1941, restated the principles of the public corporation. He outlined the growth of the institution both in theory and in practice since 1900. He critically appraised all practical propositions and problems of the device. He emphasised that during the last ten years the corporations had lost many of their distinguishing features and were tending to resemble ordinary departments. He feared that 'the clear corporate concept which Willoughby saw has passed into a state of almost total eclipse.'[53] After stating some genuine problems of the public corporation he said: "From another point of view, the Comptroller General has had no small part in removing from the government corporation the characteristics which made it a special type of administrative device. While the success of early corporations was in large measure traceable to the absence of audit control by the Comptroller General and whereas since 1921 it (the Comptroller General) has taken the position that the mere fact of incorporation does not operate to release an agency from statutes governing the conduct of regular government business."[54] Pritchett believed that strict adherence to the idea of corporate autonomy would require that independence from parliamentary and departmental control be maintained, whereas corporate autonomy had fallen foul of the prevailing trend towards integration.[55] He equally held the Supreme Court

[52] Oliver P. Field, *op. cit.* p. 784.

[53] C. Herman Pritchett, "The Paradox of the Government Corporation", *Public Administration Review*, 1941, p. 386.

[54] *Ibid.* p. 386.

[55] His hint is towards one of the recommendations of Brownlow Committee of the United States (1937) which meant integration of every public corporation in the United States with the departments of the Government.

responsible for the existing paradox. He remarked: "The Supreme Court has appeared baffled by the use of this administrative device and unable to make up its mind what status to accord to Government Corporations. In some instances the Court has apparently accepted the corporation as a special form of government organisation, entitled to special treatment and possessing special status simply by reason of its corporate characteristics. . . . In a contrary line of decisions, however, the Supreme Court has failed to find any reason for treating a corporation differently from other government agencies."[56] He concluded with the remarks that while no doubt the continuous use of this institution justified its basic utility as an administrative device, its distinct attributes had been disappearing before our eyes, like the Cheshire cat.

While sharing the scepticism and concern of Pritchett over the disintegration of the basic attributes of the public corporation, V.O. Key Jr. held that "A considerable number of corporations, usually sometime after their establishment, have felt the pressure of Congress to force them into the mould of an ordinary department."[57] Key particularly emphasised the financial autonomy of the public corporation which he considered was the most significant privilege enjoyed by a full-fledged government corporation. Corporation funds might be utilised until exhausted, whether it took one year or ten; corporations earnings might be retained in the custody of the corporation as provided by its statute. In practice all these autonomies, he feared, had been narrowed down by means of successive actions by the Executive and the President, under the policies of greater control over the financial programming of corporations. He remarked that government corporations had placed a high value on freedom from civil service rules and procedures, but that their special privileges in personnel matters were rapidly disappearing. Key held that 'the theory of corporate autonomy was never completely applied. . . . Congress was somewhat baffled[58] in its

[56] C.H. Pritchett, *op. cit.* pp. 386-389.

[57] V.O. Key Jr. "Government Corporation" in Fritz Morstein Marx, (ed.) *Elements of Public Administration* (New York, 1946), Chapter 11, p. 240.

[58] It is interesting to note that Pritchett used the same word (*i.e.*, baffled) for the Supreme Court of the United States. This indicates that there is a sufficiently high degree of unanimity of views of various critics.

dealings with government corporations. They do not yield very well to the types of control exercised over government departments. At times, the intervention of Congress is not calculated to guide general policy but to gain partisan, personal, or local advantage.'[59]

II

World War II brought another spurt in corporate activity. With the creation of a number of corporations, for the first time in the history of some western countries, the public corporation was gifted with a commanding weight, which provided the proponents of this institution with an opportunity to re-establish the case for corporate autonomy. Before any body could accomplish this task, in the United States, the Hoover Commission Report was already published in 1949. The following three recommendations made by the Commission were of great significance:

(i) In connection with the boards of directors of public corporations, the Commission stated: "Where boards or part-time boards are established, they should be wholly advisory and be appointed by the President."[60]

(ii) Regarding the financial autonomy of the public corporations, one of the task force committees remarked: "It is required that revenues be available only for current operating costs, all expenditures for plant expansion and non-revenue-producing programs being made from appropriations therefor."[61]

(iii) Dealing with the issue of accountability of the public corporation the Hoover Commission recommended: "Most of these agencies (*i.e.*, Government Corporations) are within executive departments but some have independent status and their activities are not adequately co-ordinated with those of the executive branch . . . where these corporations are located in the departments or major Government agencies, the heads of such agencies, or representatives designated

[59] V.O. Key Jr., *op. cit.* pp. 247-258.

[60] Hoover Commission Report on Federal Business Enterprises, 1949, p. 10.

[61] Revolving Funds and Business Enterprises of the Government (Government Printing Office, 1949), p. 174.

by them, should serve as *ex-officio* chairmen of their advisory boards."[62]

Considering the Hoover Commission Report as a raid on the institution of the public corporation, Marshall Edward Dimock wrote two articles at the end of 1949 in which he fully elaborated the fundamental characteristics of the public corporation.[63]

In these articles Professor Dimock establishes his case essentially on what he believes to be inherent principles of the corporate form of organisation. Although agreeing that there is no inherent magic in the term 'corporation', Dimock distinguishes between 'authentic' corporations and others which have not been established along principled lines and, consequently are not worthy of the title.

The one distinguishing attribute of an authentic corporation is autonomy by which he means the right to manage its own affairs. It is the privilege of being left alone so long as the corporation does not overstep the rules laid down in advance. He thinks that such autonomy is the chief virtue of the corporation—greater than corporate personality, limited liability, or perpetuity.[64]

Autonomy means concentrating managerial powers in the hands of competent people and giving them enough rein to achieve the desired results, which, he thinks, can only be achieved by creating board of directors of an effective nature. An effective board of directors, Dimock advocates, is the key to programme success. Advisory boards, as proposed by the Hoover Commission, he says, if widely adopted might prove worse than no board at all. Dimock states that the analogy that Congress is the board of directors is not entirely appropriate. It is analogous to the executive committee of a private corporation. Arguing for the effective board of directors, he says, "The best way to avoid inefficiency is to catch it when it starts. The best way to detect inefficiency early and to set about putting things right is to introduce into the organisation an internal control mechanism.

[62] Revolving Funds and Business Enterprises of the Government, *op. cit.* pp. 8-10.

[63] M.E. Dimock, "Government Corporations; A Focus of Policy and Administration, I and II", *American Political Science Review*, 1949, pp. 899-921, and 1145-1164.

[64] M.E. Dimock, "These Government Corporations", *Harper's Magazine*, 1945, p. 570.

This mechanism is the effective board of directors."[65] He enumerates the important functions of the board and at the same time strictly warns that the boards should not undertake day-to-day administration which is the job of the general manager.

Internal management and administration should be according to two principles if efficiency is aimed at which he states as: (a) Autonomy of management; and (b) Unity of management. "Autonomy of Management" is defined by him as "The internal management placed under a single co-ordinated leadership under which all elements needed for success are combined in a manner conducive to efficiency and flexibility.[66] He also elaborates the factors which produce "Unity of Management".[67]

Closely related to managerial autonomy is financial autonomy. Professor Dimock believes that financial autonomy is at the centre of every other autonomy. It includes the initial capitalisation and consequent removal of the necessity of annual appropriations, power to borrow money, ability to retain

[65] M.E. Dimock, in the *American Political Science Review* (I), *op. cit.* p. 917.
[66] *Ibid.* p. 919.
[67] (1) A clear division of area and personnel as between the determination of policy and its execution.
(2) A single executive with adequate authority to direct and coordinate all parts of the internal organisation.
(3) Opportunity for the chief executive to present his plans for consideration and clearance by the policy board.
(4) A clear definition of major and related objectives, from top to the bottom of the organisation.
(5) The formulation of policies related to and designed to carry out the stated objectives.
(6) Accurate analysis of what each person in every position is expected to accomplish.
(7) An organisation scheme divided logically into functional areas, but so interrelated as to secure coordinated effort.
(8) Concentration at the top in planning, direction, and control, together with the deconcentration of execution as far down the line as possible.
(9) Area decentralisation to accompany administrative delegations of authority, thus working toward initiative and flexibility at the periphery where most of the actual service is rendered.
(10) Freedom from outside "interference" with personnel, purchasing, accounting methods, and the like, which force the management into a rigid mould and deprive it of freedom to experiment, adapt, and excel.

earnings as working capital or for reserves; freedom in the matter of expenditures, from general governmental regulations and restrictions. Hence, if financial recommendations of the task force committee are applied, he fears, no financial freedom and autonomy will be left. Dimock also states that the corporation should have its own budget, which should be of the annexed business type, meaning that it should be separate and distinct, not merged with the overall budget of the government: attached to it, not an integral part of it.

Regarding personnel policies, he remarks, "The corporation should be free to adopt business-like methods and incentives, just as in England all the parties have observed this policy."[68] The auditing and accounting methods should be according to business principles.

As far as the public accountability of the public corporation is concerned, Dimock believes that the problem is itself quite serious but has become more so, being the battleground of pressure groups and departmental officials. He disagrees with any solution based on the idea of departmental integration of a government corporation, as seems to be the intention of the executive branch. He feels that perhaps those who plead for integration want to reduce the number of administrative units to the smallest extent and to place them all firmly in the hands of the Chief Executive for simple, symmetrical and effective supervision. They, perhaps, forget that it will also lead to over-consolidation and the integration of powers and policies at one central point.

With the American Constitution one great difficulty is that the Chief Executive is not the outcome of Parliament. Both may sometimes disagree. Though it seems hypothetical, yet the possibilities are by no means remote. Suppose if such a situation arises with regard to the policy of a public corporation, should that corporation look to the Executive or to Congress for a directive? According to the principles expounded by Willoughby, the right place is Congress. Obviously, the Executive would feel ignored. With this background the interests of the Executive have led it to a struggle to get all corporations integrated with one or the other department and all

[68] Dimock (I), *op. cit.* pp. 918-920.

other arguments for integration seem to be just window-dressing. Dimock finds no validity for departmental integration of the corporation on any administrative or financial reasoning. To solve the problem of accountability through integration seems to mean an end of corporate autonomy. He holds that 'if this step was thought necessary, then there is no need for government corporations as such.'[69]

Dimock equally disapproves Webbs' formula based on the principle of 'separate organisation for all economic functions of the government',[70] nor does he see eye to eye with the device of *cabinet co-ordination, i.e.*, to appoint an official of cabinet rank to deal with all questions growing out of the activities of government corporations. He thinks that the problem can be solved by grouping related corporations along the lines of the holding company device. It has, he believes, the virtue of bringing into working accord the programmes which seek common related ends, thus centring administrative responsibility instead of scattering it. Those corporations which do not fall into any group should have, what he calls *cabinet liaison.* This means such corporations should establish relationship with the secretary of the department concerned and to give him all information required. He sums up as :

> In order that the government corporation may contribute to the solution of problems arising in its area of the economy, and in order that it may be held accountable from a policy as from an administrative standpoint, every corporation which forms a part of a larger program should be related thereto, either by grouping several corporations into a cluster or by a liaison relationship to other major areas of administration.[71]

[69] Dimock (II), *op. cit.* p. 1153.

[70] S. & B. Webbs, *A Constitution for the Socialist Commonwealth of Great Britain* (London, 1920).

[71] Dimock (II), *op. cit.* pp. 1153-1157.
Recently, in India, the Administrative Reforms Commission's report on PUBLIC SECTOR UNDERTAKINGS makes a strong case for every corporation which forms a part of a larger programme to be grouped together and called a 'Sector Corporation'. While emphasising the need for 'Sector Corporations' the Commission holds that:
"There is a great need for co-ordination and provision of common services among public sector undertakings operating in the same

Professor Dimock concludes: "If government corporations are to be deprived of their legal, organisational, managerial, financial and personnel freedoms, they might better be abolished and their programs taken over by ordinary bureaus."[72]

The description of autonomy of management and unity of management are Dimock's original contributions based on solid theoretical grounds and practical observation. He also confirms that it would be rather unjustified to think of public administration as a self-contained entity capable of practical dissociation from the field of pressure groups and public policy.

However, we do not think that the problem of public accountability could be solved, either in the United States or elsewhere, with the solution offered by Dimock. On theoretical grounds, his formula seems to suffer from two serious drawbacks.

Firstly, the idea of grouping corporations might be a solution for any problem, say of co-ordination of policy, but it is hardly a solution to achieve public accountability. In a very simple sense, by accountability we mean 'answering for their conduct or performance to an appropriate public authority by

field. The failure to take this need into account at the planning stage is one of the most unsatisfactory features relating to the setting up of public undertakings by the Government [*of India*].

"We find cases where new projects have been set up without utilising the organisation already built up in running multi-unit undertakings and without entrusting to it the management of the new projects .... Cases also exist where a new Government Company has been set up more or less at the expense of an organisation that had already started developing in a multi-unit undertaking. Such unsystematic and needless proliferation leads to fragmentation of the total industrial effort in the public sector. We feel that in allowing this proliferation to take place, and in failing to set up integral statutory authorities in coherent sectors of public enterprise, we have not only denied ourselves the benefits of large-scale operations but have also missed a major purpose of nationalization of key sectors of our economy.

"We are of the view that sector corporations should be set up in India in major areas of public enterprise."

(See Government of India, Administrative Reforms Commission, Report on Public Sector Undertakings, 1967, pp. 14-15).

[72] Dimock (II), *op. cit.* p. 1157.

those who are entrusted with the duty of carrying on certain activities, in such terms as an overriding statute or the internal rules and regulations of the organisation prescribe.' How grouping of corporations answers this question, one simply cannot understand. Perhaps Professor Dimock meant by "grouping corporations", gearing them into the *political economy* in order to create workable standards and evaluate their results.[73]

Secondly, even if it were presumed that any such grouping would be of any help, though we are by no means sure that this could in fact be the case, it would nevertheless be extremely dangerous to group several corporations into clusters. That would be a step towards the building up of 'economic empires'. Whereas departmental integration would be a march towards a totalitarian state, grouping will directly lead to a corporate state. It would be better to feel lost than to be further misled. We, therefore, believe that Dimock's proposal does not supply a satisfactory answer to the problem of accountability of the public corporation.

One of the recent contributions to the theory of the public corporation is one made by Harold Seidman.[74] He being in the Bureau of Budget of the United States, presents the official point of view. He does not feel the necessity of the board of directors for the public corporation. He outrightly refutes the concept of 'corporate autonomy'. In his opinion an authentic corporation is largely a fictional creation.[75] He holds that there are no inherent characteristics of the public corporation. Seidman concludes that 'the theory of the autonomous government corporation has taken hold principally in those countries in which the central government is weak or unstable, or in which there is deep-seated distrust of government. There, he says, they literally constitute a headless and irresponsible fourth branch of government.[76]

In general, Seidman's analysis is totally one-sided and biased. To think of a public corporation without a board of directors might be possible under certain circumstances in a particular case but to hold on theoretical grounds that the

[73] Dimock's correspondence with the author, *op. cit.*
[74] H. Seidman, "The Theory of the Autonomous Government Corporation: A Critical Appraisal", *Public Administration Review*, 1952.
[75] *Ibid.* p. 95.
[76] *Ibid.* p. 96.

board of incorporators is not an essential attribute of the public corporation is nothing but height of stupidity on the part of certain pressure groups. Willoughby's whole theory was based upon the assumption that 'each such service will have its own organic act . . . its own board of directors.'[77]

Strictly from the legal point of view almost every public corporation created by an Act of a Parliament contains provision similar to the one given below :

> The corporation shall be a body corporate having perpetual succession and a common seal with power, subject to the provisions of [*this*] Act, to acquire, hold and dispose of property, and may by its name sue and be sued.[78]

The corporation being an artificial body must need some incorporators to represent its name and authority in the court of law in case of a suit. This is why immediately after the clause quoted above the following provisions are made:

> The Board of Directors first appointed shall be deemed the incorporators . . . .[79]

It is difficult to think of a corporate institution without incorporators who are entitled, by virtue of the authority vested in them by the same authority which created the public corporation, to represent the corporation in case of need in the court of law and to make use of the seal of the corporation to acquire, hold and dispose of property of the corporation.

While ignoring the legal significance of the board of directors of the public corporation, the advocates of public corporations without governing boards may ask : What boards are supposed to do that Parliament and the management of the corporations cannot do as well or better ? It is not difficult to answer this question. The days are long past when Sir Robert Peel could personally supervise all the functions and affairs of the Government. There are certain distinctive functions which only a board of directors can perform. They cannot be discharged so well, even at all, either by Parliament or by Ministers of the Government, even if they had the time. For instance, an effective board of directors is expected to undertake the responsibility

[77] W.F. Willoughby, *op. cit.* p. 507.

[78] For instance, see The Life Insurance Corporation Act of India, 1956.

[79] For instance, see The Tennessee Valley Authority Act of 1933 (48 Stat. 58; 16 U.S.C. 831 *et seq.*)

of certain policy matters;[80] organisational policies;[81] key executive appointments;[82] public relations;[83] the promotion of further legislation and other allied functions. These are matters of a purely administrative and technical character which can only be performed by the competent boards of directors of the corporations. Professor W.A. Robson believes that the governing board occupies a position of crucial importance in the direction and management of a nationalised industry[84], and in Professor Dimock's opinion 'these are indispensable and distinctive functions which only a board can perform.'[85]

The effect of Seidman's interpretation that the board is not an essential attribute of the public corporation, because all its functions can be performed by the President and Congress, is to open all doors and windows to political pressures. This is contrary to the essential purpose of the public corporation.

The theory of the public corporation is still in evolution. It is impossible to find complete agreement as to what the status and frame of this institution should be. However, the essence of the public corporation appears to reside in the following characteristics:

(1) The public corporation is created by or under the authority of an Act of the Legislature, consisting either of a special charter or of a general permissive statute, to accomplish some purpose authorised by

[80] For instance the board spells out in detail the broad general objectives and policies established by Parliament in the charter, in statute, and in appropriation Acts; to resolve serious conflicts of interest or policy with other public corporations or with private interests; the adoption of important new inventions, processes or improvements; policy on scientific research and development, training and education; the programme of current and future output; the consideration of serious criticism by Parliament, consumers or the public; the policy of the undertaking in staff matters, including question of wages, incentives, morale, and consultation with employees, etc.

[81] Such as the coordination of planning and production; costing and sales, accounting and auditing, etc.

[82] For instance, who are to be the departmental heads, etc., and who is to be the general manager when a vacancy occurs.

[83] Such as relations with the general public, consumers, employees, pressure groups and other agencies of the Government.

[84] *Vide* Robson, *Nationalised Industry and Public Ownership* (London, 1960), p. 212.

[85] *Vide* Dimock, *op. cit.* p. 918.

the charter or governing statute, under a scheme of organisation, and by methods thereby prescribed or permitted.

(2) The public corporation is an artificial being, and a juristic creation of law. Being the mere creature of law, it possesses only those properties which the enabling instrument confers upon it, either expressly or as incidental to its very existence. Among the most important are its specific powers, duties, immunities, form of management and its relationship to the government and with other established institutions.

(3) Unlike a normal type of government agency the public corporation is a separate entity for legal purposes, and customarily can sue and be sued, can enter into contracts and can acquire property in its own name.

(4) The public corporation has neither public nor private share-holders. The whole nation is, in a symbolic sense, the share-holder and is represented by its parliament and government.

(5) To keep it free from political pressures and frequent Government interference, its administration is entrusted to a board of directors who are appointed according to the provisions made in its enabling act. The nature of boards may vary according to the nature of the enterprise entrusted to it. The board of directors is not expected to interfere in the detailed management of the corporation, which is the job of the general manager or the managing director.

(6) The public corporation, by virtue of its commercial functions, should have freedom from Treasury controls, except for any appropriations required for the provision of capital or the meeting of losses. Usually, public corporations are given the right to use subscribed capital, to raise new capital, to utilise operating revenues to defray operating expenses, to provide working capital and to build up reserves.

(7) In matters of personnel, the corporation should have considerable freedom of action and should not be subject to the Civil Service Rules. All appointments, terms and conditions of service should be strictly

according to efficient business enterprise principles.

(8) Public corporations are usually given the power to determine the character of and necessity for their expenditure, and the manner in which this is incurred, and paid. They are thus exempted from most of the regulatory and prohibitory statutes applicable to the expenditure of public funds. Their funds usually do not end with the fiscal year.

(9) The accounting systems of public corporations normally follow private commercial practice and are designed to reflect all costs properly attributable to their operations. Each corporation is directly responsible for prescribing its own accounting system in accordance with standards prescribed by the government in advance.

(10) The accounts of public corporations are audited by some competent authority as prescribed in their governing statutes. The auditing is according to the principles and procedures applicable to commercial transactions.

(11) All public corporations, although they are separate legal entities, are yet accountable to the public through the public's representatives in the government and parliament, according to rules laid down in their enabling instruments.

III

Another fascinating question closely related to the preceding one is: Could not these economic enterprises, for which public corporations have been and are being made use of, be performed by regular government department ?

It might be true to say that if there is a single underlying theme in the literature of corporate autonomy, it is a distrust of government departments. We do not think that we are entitled to assume without arguments that the public enterprise of industrial and commercial nature would be less safe if entrusted to administrative civil service departments as compared to being entrusted to public corporations. The advocates of the public corporation have almost developed a fashion to use all ridiculous phrases, *i.e.*, mediocrity, business crippled, notorious,

lethargic, etc., for the civil services and their departments. It is rather too much. It goes without saying that in some countries, civil services are quite efficient, on the whole. After all they have their own limitations under which they have to work. They are subject to overhead controls applied by the Treasury, the Department of Justice, the Comptroller and Auditor General, the Civil Service Commission, their own political heads, Parliament and pressure groups. In a way some of these limitations on departments are by no means without utility. Experience too has justified the need for limits on officials who spend other people's money. They have some drawbacks which need reforms. After all, all institutions have their weaknesses. He who thinks a faultless thing to see, thinks that never was, nor is, nor ever shall be. Most of the civil servants in responsible positions do justify the status they hold. But business is something else. It has developed its own rules of conduct which all are required to observe who enter into it. It needs so many freedoms and sometimes it breaks all limitations or breaks itself. It is not a part-time job, it needs whole time attention to handle headaches. It is rightly said: "Be a business man to do business", which we fear civil servants are not. Most successful civil servants presumed before opting for service that they were not suited to business careers and after actually joining the services they become part and parcel of a big administrative institution called the "department" which works under many limitations which we would like to discuss one by one.

The immunity of government and its departments from suit, without its consent, is the first legal limitation on the departments to undertake business enterprises. Liability to suit is almost indispensable in the conduct of any business enterprise, for questions of the fulfilment of contracts and the assessment of damages for wrongful actions are certain to arise whenever business transactions occur and deemed recourse to the known and established practices and machinery of the courts for their solution. Very recently, statutory provisions have been made in some countries to make their governments normally liable in contract and in tort like every other legal person. Such provisions bring some States within the reach of the ordinary citizens under the ordinary process of the law and

in the ordinary courts.[86] Though it is a significant development from a business point of view, it is too early to assess the practical utilities of the provisions where they have been made. A detailed study of this aspect needs exclusive treatment. While appraising the Federal Tort Claims Act, 1946 (U.S.A.) and the Crown Proceedings Act, 1947 (U.K.) which provide such provisions in the United States and England respectively, Mr. H. Street writes that 'the task of interpreting the two Acts is made more difficult by the uncertainty about the principles of statutory interpretation to be applied by the courts. Both Acts for the first time impose upon the Government a more or less general liability in torts. Are they to be construed liberally in order to carry out the supposed intention of the Acts, namely, to end the former immunities, or are they to receive a strict construction? The problem is magnified, because neither Act is clearly defined.'[87] On the other hand, liability to suit has always been a distinctive attribute of the public corporation which conveniently makes it a more suitable institution to conduct a business enterprise than a government department.

Thurston's following remarks in this connection, though made quite some time ago, still carry the same strength and weight:

> Since the government itself still claims certain legal privileges and immunities, and avoids assuming certain responsibilities—in this respect one may say that the government has lagged behind the growth of law, or rather has not yet approached the stage of civilisation marked by the application of these legal precepts to conduct—a government corporation is better to conduct—a business enterprise than a government department and can more effectively and economically deal with private business organisations, since the latter know that their rights against the corporation can be enforced in the courts.[88]

[86] In U.S.A. *vide* Federal Tort Claims Act (1946); in U.K. *vide* Crown Proceedings Act (1947); in Australia the State of Victoria abolished the immunity of the Government in tort in 1955; in Canada *vide* Statutes of Canada 15-16, Geo. VI C 33. I Session 1951.

[87] *Vide* H. Street, *Governmental Liability—A Comparative Study*, (Chapter II, "Tort"), p. 25.

[88] *Vide* J. Thurston, *Government Proprietary Corporations in the English-Speaking Countries* (Cambridge, 1937), p. 265.

Next to legal limitations come the financial handicaps under which a department has to work. The constitutional principle that 'no money can be paid from the Treasury except in pursuance of law' is the 'cause' of so many causes which enables the Executive and Legislature to keep controls over the administrative departments. It not only determines the amount to be spent but also how the money shall be spent. 'All public revenues shall be deposited in the Treasury' is also a corollary of the above principle. Again the department works under the principle of 'annual appropriations', which assumes that an ordinary department must anticipate its financial needs long in advance of actual expenditure. Annual appropriations keep the department on its toes because parliament may at any time ask it to account for the appropriated money. In spending money it must take care lest it violates the voluminous jurisprudence on the subject as interpreted by the Comptroller General. Moreover, where a government agency engaged in a business activity must depend solely on appropriations for income purposes, it is inevitable that political expediencies may operate at any time to deprive it of needed funds with regard to the purely business considerations involved. In short, in how many ways a department can be controlled on financial grounds, even most of the departments may not know. All these controls have their own reasons and significance. But with these strings, how can a department be entrusted with economic ventures which need substantial financial autonomies. We may create a revolving fund within a department or we may introduce some other financial flexibilities and still all controls are so well knit that it is practically impossible to escape from the Treasury's trap. For instance, after a considerable struggle a provision for a reserve fund was revived in the British Post Office in 1956. Even then, the funds could not be used without the approval of the Chancellor of Exchequer and it was difficult to know on what grounds the latter granted or rejected a particular demand. Eventually the British Government decided in 1966 to convert the Post Office from a government department—the status it had enjoyed for over three hundred years—into a public corporation because the growing business of the Post Office could not thrive if it was allowed to remain subject to intimate scrutiny in the House of Commons.

Moreover, even if a department is provided with a revolving fund, it cannot be expanded by further borrowing. In fact, the Treasury's code book contains all controls and no autonomies. Professor H.R.G. Greaves considers it the most significant reason which strongly supports the case of the public corporation. His most widely quoted remarks need reproduction; he says:

> The most important single cause of the flight from the ordinary department to the semi-independent public board is generally the least stressed and the most imperfectly understood. It is the working within the civil service of Treasury control. The basic and at the same time the soundest reason for establishing such bodies (*i.e.*, public corporations) is not that they may be freed from public accountability, ministerial directive, or political interference, but from the dead hand of Treasury.[89]

Professor Greaves holds that 'there is no commercial house in England that would show a profit at the end of the year if it were subjected to the kind of control which the Treasury exercises.'[90]

Every government department has to work under some administrative controls. It is dictated to them 'what to do' and 'how to do'. Budget personnel, accounting, and legal officials on the government-wide level make it their business to see that the instructions are formulated and carried out to the letter. This is called the process of administrative consolidation. Whereas in the successful conduct of a public commercial undertaking, as well as in private business, elasticity of management is necessary. This means that the directing official must be free to make quick decisions relative to business affairs, so that if one policy does not work another one may be easily and speedily substituted, and that experimentation and risk taking should not only be possible but should be actually encouraged, and that the administrative organisation may be reorganised from within from time to time without the difficulties of securing permission from a superior authority. The administrative construction of the regular department is such that the above mentioned

[89] H.R.G. Greaves, *The Civil Service in the Changing State* (London, 1947), p. 122.

[90] *Ibid.* p. 124.

elasticities cannot be introduced into it.

Finally, judging from the political point of view, whenever any government has once decided to undertake some business-like venture, there has always been a unanimous demand that the venture be kept away from the political arena. Since 'Economics' and 'Politics' have great attractions for each other, with the entry of the state into economic operations the fears obviously arise lest government political operations and economic activities indulge in illegitimate intercourse. Because departments are headed by active political leaders, the dangers of such practices should not be remote. Pressure groups do exert their pressures in order to obtain their purposes. Political appointments, the granting of contracts and loans, or the rendering of special services as political favours must be consequences if the departments are entrusted with economic ventures. These activities might be immoral from a utilitarian point of view but they become standards of conduct stamped with Government approval. From another point of view, the traditional government department lacks continuity because of changing political fortunes. In view of the politics of the pressure groups Lord Reith, one of the staunch advocates of public corporations, states: "I belong to no political party and that [*sic*] I would rather have private ownership than nationalisation, if nationalisation means the conduct of public services by a government department."[91] To what extent public corporations have actually succeeded in keeping political pressures away from their ventures is altogether a different question. However, on theoretical grounds, the public corporation is a separate legal entity, it has its own board of directors, its own management with administrative and financial autonomies. These are quite capable of keeping politics and pressure away from their operations.

[91] House of Lords Debates, Vol. 123, Col. 415.

II

The Legal Status of the Public Corporation in the U.S.A., the U.K., and India

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The Legal Status of the Public Corporation in the U.S.A., the U.K., and India

"What was this corporation in fact? A mere legal entity; a mere agent of the state, existing for the state, with funds belonging to the state, and dealing wholly upon the credit which these bills derived from the state. The persons who were president and directors for the time being, were not, as I have already said, personally liable for the payment of those bills. The metaphysical personage only was liable; and the promise if it is not to be treated as a mere delusion and phantom, was the promise of the state itself, through that personage."[1]

—Justice Story

"It is, in general, highly desirable that, in entering upon industrial and commercial ventures, the Governmental agencies used should, whenever it can fairly be drawn from the Statutes be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed."[2]

—Justice Learned Hand

As the "Agenda" of the State in pluralistic societies expands rapidly, public corporations grow bigger, employ larger numbers of people, administer production and distribution of strategic enterprises, they become the wielders of power of ever

1 In *Briscos v. Bank of the Commonwealth of Kentucky*, 11 Peters 257 (U.S. 1837), at 343.

2 In *Gould Coupler Co. v. Fleet Corporation*, 1919, 61. Fed. 716, 718.

increasing significance. The rules and practices determining the rights and obligations of these "power centres" seem to have developed haphazardly, and no precise answer has been provided to the question of whether a public corporation should be regarded as an instrumentality which, despite its corporate form, shares the prerogatives of the State. That this problem has frustrated the efforts of the Bar and of the bench almost everywhere can be well demonstrated by the multitude of contradictory judgements handed down in this field. It has been particularly difficult to determine the legal status of the public corporation as the liability of the State itself has been a problem which continues to plague most legal systems. To determine whether a public corporation shares immunities with the sovereign it is necessary to take a fresh look at the issue of state liability in some countries. In the following sections issues will be examined with special reference to the United States, England and India.

I

THE DOCTRINE OF SOVEREIGN IMMUNITY

Formulations such as : "*Quod principi placuit, legis habet vigorem*"; "the Supreme power may not be sued without its consent"; "there can be no legal rights against the authority that makes the law on which the right depends", illustrate a doctrine which has roots in Roman Law, and was recognised both in theology and feudalism.[3] Time, with its mutations upon the theory of the role of the State in society, has sapped the strength from this historic doctrine. More recently, statutes have been passed in some countries to redefine governmental liability. Both the enactment of the Federal Tort Claims Act (1946) in the United States;[4] and the Crown Proceedings Act (1947) in Great Britain,[5] were at first claimed to be major steps

[3] Reasons based upon royal prerogative have no application in the United States where the Eleventh Constitutional Amendment gave constitutional status to the doctrine of sovereign immunity. For a British approach see : I Pollock and Maitland, *History of English Law*, 2d ed., pp. 515-518, (1899); and, 9, Holdsworth, *History of English Law*, 8 (1926).

[4] 60 Stat, L. 842, 28 U.S.C. (1946), 921.

[5] 10 & 11 Geo. 6, C. 44.

in pursuit of laying to rest the doctrine of sovereign immunity. To what extent such legal developments actually do put the State on the same footing as a private legal person needs further investigation.

(i) *Governmental Liability in the United States*

Since 1929 Congress had under consideration a series of bills proposing that the United States should be liable in torts, but not until 1946 was the Federal Tort Claims Act adopted as Title IV of the Legislative Reorganisation Act. The Statute was introduced under the heading: "More Efficient Use of Congressional Time" and this approach was justified as an organisational reform rather than as a means of assuring adequate compensation for injured citizens.[6]

The Federal Tort Claims Act (1946) grants to federal district courts, sitting without a jury and subject to the Federal Rules of Civil Procedure, exclusive original jurisdiction over all money claims, in whatever amount, for property damage or personal injury caused by the negligent or wrongful act of a government employee within the scope of his employment. The Statute is a general waiver of governmental immunity in tort and is limited only by specific though significant exceptions. Accordingly jurisdiction is denied over claims based on an act done pursuant to a Statute or regulation whether or not valid; one done in the exercise of discretion; or while exercising such governmental functions as the regulation of the monetary system, or the quarantine service, or one of a class for which satisfactory provision has been made, such as malicious prosecution, slander and assault. There were some thirteen types of claims set forth in the Statute for which the Government had expressly withheld its consent to be used. By implication, initially it was inferred that Congress had intended all other claims to be cognizable under the Act. In the leading case of *Feres v. United States*,[7] however, the Supreme Court held that 'the Government was not liable to members of the armed forces for injuries arising in course of military duty even though this was not one of

[6] See Report of the Joint Committee on the Reorganisation of Congress, Sen. Rep. No. 1011, 79th Cong., 2d. Sess. 25 (1946).

[7] 340 U.S. 135 (1950).

the specified exceptions."[8]

Apart from the exceptions specified there are noticeable ambiguities latent in the terms: "employee of the government"; "acting within the scope of his office or employment"; "federal agency"; "negligent or wrongful", etc. These phrases as defined in the Act are susceptible either of conservative or liberal interpretation, depending on the disposition of the judges. It is surprising that the Act uses the words "negligent or wrongful" instead of "tortious". The word "tort" occurs only in the title of the Act. The "wrongful" is subject to various interpretations, for moral wrongs must be distinguished from those basically legal, and the latter category further subdivided into wrongs *ex contractu* and those *ex delicto*.[9]

"Federal agency" is defined in the Act as including: ". . . the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, that this shall not be construed to include any contractor with the United States." This definition may lead to fine-spun legal argument supporting any desired conclusion. In the light of such ambiguous definition, it might be inferred that whether a particular establishment is acting as an agency or instrumentality of the United States may be determinable only within the framework of a specific situation. Historically, the Supreme Court has sometimes inferred that government corporations should be suable to the same extent as their non-governmental counterparts.[10] In other cases the

[8] In *Dalehite v. U.S.* (1953, 346 U.S. 15), the Supreme Court, in fact, enunciated the doctrine that the Government was not liable for the negligent exercise of a *governmental* function or a discretionary power vested in a public official. Upon this theory the Government was held not liable for damages to lands caused by the negligent performance of flood control (See *Coates v. U.S.*, 1950, 181 F. 2d. 816); for loss resulting from failure to operate a mine lawfully seized by the Government (See *Old King Coal Co. v. U.S.*, 1949, 88 F. Supp. 124); because the act or ommission complained of was governmental or discretionary. The decision in the *Dalehite v. U.S.*, has since been superseded (See *Indian Towing Co. v. U.S.*, 1955, 350 U.S. 61).

[9] See, 1 Cooley, Torts (4th ed. 1932) 2.

[10] *Keifer and Keifer v. RFC*, 306 U.S. 381 (1939) and, *Federal Housing Admn. v. Burr*, 309 U.S. 242, 245 (1940).

Supreme Court has held that one government corporation may not sue another government corporation, for this would be "nothing more than an action by the United States against the United States".[11] The Supreme Court has in this connection generally weighed the nature of the activity performed,[12] the fact that a corporation was created by Congress,[13] the ownership of corporate stock,[14] and the nature of powers conferred as distinct from those actually exercised.[15] Moreover, a corporation's primary function is not control alone: it must in fact be acting as an instrumentality or agency of the United States when committing the tort complained of. The draftsmen of the Federal Tort Claims Act presumably foresaw the possibility that a corporation whose primary function is that of an instrumentality of the United States might engage in other activities of a private nature, for which the United States should not be liable. This seems to be the most probable explanation for the phrase "and while acting as".

Above all it remains difficult to determine when and which government corporation would share the privilege of the State and it seems that Federal Tort Claims Act fails to end the common law ambiguities.

(ii) *State Liability in the United Kingdom*

In England, the doctrine of Crown Immunity was a judicial creation and stated simply that 'the State is Sovereign, the sovereign state is the law giver and that whether or not he who makes the laws submits to them is a matter of his own choice.' During the sixteenth century this doctrine developed into the theory that 'the King can do no wrong'. The growth of this

[11] See *Defense Supplies Corporation v. United States Lines Co.* 148 F 2d 311, 312, (C.C.A. 2d 1945), cert. denied, 326 U.S. 746 (1945).

[12] The Governmental-proprietary distinction is widely observed in the U.S. in the field of municipal tort liability. See Fuller and Casner, "Municipal tort liability in operation" (1941) 54 *Harv. L. Rev.* 437, 441-3; Hobbs, "The tort liability of municipalities" (1940) 27 *Va L. Rev.* 126.

[13] See *Skinner and Eddy Crop. v. McCarl*, 275 U.S. 1 (1927); *Emerg. Fleet Corp. v. Western Union* 275 U.S. 415, 426 (1928).

[14] See *Capital Bldg. & Loan Ass'n. v. Kansas Commission of Labour & Industry*, 148 Kan. 446, 83p (2d) 106 (1938).

[15] *Smith v. Kansas City Title and Trust Co.* 255 U.S. 180, 210 (1921). *Cf Fed. Land Bank of St. Louis v. Priddy*, 295 U.S. 229, 231 (1935).

prerogative strengthened the absolute status of the Sovereign and culminated in the theory of 'divine right of Kings'.[16]

The Crown Proceedings Act of 1947 was clearly a major step in the process of laying to rest the doctrine of sovereign immunity. However, the Act did not effect any considerable change in the liability of the Crown in contract; the principal change was one of procedure rather than of substantive rights. The Act did effect a radical change in the Crown's liability in tort. Yet a careful study of the Act reveals its limitations and the privileges still retained by the Crown, which are as follows:

Firstly, the expression "the Crown" is not defined by the Act. It does not provide a sharp definition of those servants for whose acts and neglects it is to be liable in tort. It purports to retain the common law definition of a servant or agent which is unsatisfactory in the case of public corporations.[17] Section 17 enacts that the Treasury shall publish a list specifying the governmental departments which are authorised departments for the purpose of the Act, and the name and address for service of the person who is the solicitor for each such department. The Treasury is eligible to revise the list from time to time. But the Act does not specify what conditions and test an institution is supposed to fulfil to be an authorised department.[18] Again, this does not make any reference to public corporations.

Secondly, section 1 does not remove all limitations on the Crown's contractual liability. It seems to be well established that there is an implied condition in all contracts made by the Crown that the Crown's obligations are dependent upon parliamentary approval for the necessary funds. Section 37 (i) of the Act expressly provides that any expenditure incurred by or on behalf of the Crown in right of Her Majesty's Government in the United Kingdom, by reason of the passing of the Act shall be defrayed out of moneys provided by Parliament. This limitation consequently remains, as does the provision that the Crown cannot by contract fetter its future executive action.

[16] E.M.Borchard, "Governmental Responsibility in Tort", 36 *Yale Law Journal*, I, at 31 (1926).

[17] H. Street, *The Governmental Liability* (1953), p. 35.

[18] "The Meaning of Government Departments", *The Law Journal*, June 2, 1950.

Thirdly, by section 2 (iv) the Crown is entitled to the benefit of any enactment which negates or limits the amount of the liability of any Government Department or officer of the Crown in respect of any tort committed by that department or officer of the Crown, in the case of proceedings against the Crown.

Fourthly, the Crown still retains a privilege in regard to the discovery of documents, and this will be discussed in detail in a separate section.

Fifthly, it is still inconclusive whether or not a judgement against the Crown can be enforced in the usual manner, although the Act empowers the court to issue a certificate which will be a sufficient authority for the satisfaction of the judgement and to make an order for the attachment of money payable by the Crown.

Lastly, section 4 (ii)(f) enacts that except as otherwise expressly provided, nothing in the Act shall affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by an Act of Parliament. The statute, therefore, retains the immunity and privileges of the Crown in regard to liability for taxes, rates and other charges, priority of debts, immunity from distraint survives, and will continue to protect those public authorities which are deemed to be under the shield of the Crown.

On the whole, by comparison with the Federal Tort Claims Act (1946), the Crown Proceedings Act (1947) is significantly tender to the Executive, and shows traces throughout of compromises with government departments. The latter have constantly been opposed to such legislation, and lingering traces of this hostility are seen in the limits imposed on military and Post Office liability and, above all, in the rules relating to discovery. One is struck by orthodoxy in the Crown Proceedings Act which explains some of the significant weaknesses of the Act, such as the absence of provision for administrative settlement.

The Statute seeks to make the Government vicariously liable (but with serious reservations) for the torts of its servants by analogy with the common law rules of vicarious liability. But the measure does not touch the most perplexing question of whether or not public corporations and their servants are to be treated as agents of the Crown.[19] For this the Crown

[19] However, section 38 of Electricity Act (1957) provided: "It is hereby

Proceedings Act remains singularly unhelpful.

(iii) *Liability of the State in India*

Just as in the United States and England, in India too, liability of the public corporation is closely connected with the liability of the State. To talk of governmental liability in India is perhaps an adventure into a territory which, if not *terra incognita*, may at least be considered to have been hitherto very imperfectly mapped. At present, the liability of the Union of India and of the States to be sued is regulated in part by the following constitutional provisions :

> The Government of India may sue and be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by the Constitution, sue or be sued in relation to their respected affairs in the cases as Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued *if this Constitution had not been enacted.* [20]

The italicised part of the above provision is very important. It has the history of the entire period of British rule in India as its background, and in order to appreciate its significance we will have to consult parallel provisions made in earlier constitutional acts. Earlier in the Government of India Act (1935) it was provided that:

> The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by

declared for the avoidance of doubt that neither the Electricity Council nor the generating Board nor any of the Area Boards are to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown, and no property of the Council or any of those Boards is to be regarded as property of, or held on behalf of the Crown." Electricity Act, 1957, 5 & 6 Eliz. 2.

[20] Constitution of India, art. 300.

virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.[21]

This provision points towards the Government of India Act, 1915, which states :

(i) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council, as a body corporate.

(ii) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed.[22]

The Government of India Act 1858 enacted :

All persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State for India as they could have done against the said Company.[23]

It is relevant to ask : What, then, is the liability of the Union and the States of India today ? It has been noted that to answer this question we have had to go back as far as the days of East India Company rule. "It is, therefore, incumbent on us," held the Law Commission of India in 1956, "to consider the question to what extent the East India Company was liable before 1858."[24]

The East India Company came into possession of the *Dewani*[25] from the Moghul Emperor in 1765, and from that time up to 1858 the Company had a dual character, *viz.*, that of

[21] The Government of India Act, 1935, art. 176 (i).

[22] The Government of India Act, 1915, s. 32.

[23] The Government of India Act, 1858, s. 65. It should be interesting to know that although the Secretary of State [for India] was a body corporate, or in the nature of a body corporate, for the purpose of contracts, and of suing and being sued, yet he was not a body corporate for the purpose of holding property. Such property as formerly vested in the East India Company then vested in the Crown. So to sue person No. 1, who did not and could not have any property, in order to get at a certain part of the property that was owned by person No. 2 could only produce a strange result.

[24] Government of India, Law Commission of India, First Report: *Liability of the State in Tort* (1956), p. 2.

[25] "*Dewani*" means the collection and administration of state revenues.

trader as well as sovereign in as much as it obtained the right of fiscal and general administration of the Company from the grant of the *Dewani*. Later on, the Company managed the government of India on behalf of the British Crown under the authority of the Charter Act of 1833. In 1858, the British Crown assumed sovereignty over India and took over the government of India from the Company.

The case law of the legal liability of the State in India does not afford much assistance. As far as the contractual liability of the State is concerned, the status of the Government is the same as that of an individual under the ordinary law of contract.[26] Direct suits were allowed against the East India Company, the Secretary of State, or the existing governments in matters of contract in lieu of a *petition of right*.[27]

The vicarious liability of the Government for torts committed by its servants was never clearly stated. The East India Company shared the immunity of the Sovereign in respect of its "Sovereign Acts," and, consequently, the Company's successor, the Secretary of State in Council, also enjoyed such immunity in tort cases.[28] There are many cases on record where no action was permitted against the Government for injury done to an individual in the course of the sovereign functions of the Government.[29] Recently, it has been discovered by the Law Commission of India (1956) that in some cases "it was conceded

[26] *Vide* Government of India Act, 1919, s. 30; Government of India Act, 1935, s. 175; Constitution of India, art. 298 (i); for detailed study, see D.D. Basu, "Suability of the State under the Constitution of India", *The Federal Law Journal* (1949).

[27] According to English law, *petition of right* means: A proceeding in chancery by which a subject may recover property in the possession of the Crown. This is in the nature of an action against a subject in which the petitioner sets out his right to that which is demanded by him, and prays the monarch to do him right and justice; and upon a due and lawful trial of the right, to make him restitution. (See Walter A. Shumaker and George Foster Longsdorf, *The Cyclopedic Law Dictionary*, 3d. ed. 1940, p. 835).

[28] *Vide* D.D. Basu, *op. cit.* pp. 1-4.

[29] For instance, Commandeering goods during war (*Kesoram v. Secretary of State*, 1926, 54 Cal. 969); improper arrest, negligence or trespass by police officers (*Shivabhajan v. Secretary of State*, 1904, 12 Bom. 314); loss of movables from Government custody owing to negligence of officers (*Ramgulam v. U.P. Government*, AIR, 1950, All. 206).

that the immunity might also extend to certain acts done for the public safety, though these acts would not be acts of State."[30] On the other hand, in certain cases suits were allowed against the Government for wrongs done by public servants.[31] In fact, there is no authoritative definition of what "sovereign acts" are.[32]

In view of the existing defective and archaic state of the law, and on the initiative of the President of India, the Law Ministry of India referred the matter to the Law Commission in 1955-56. The Commission was asked "to consider the question whether legislation on the lines of the Crown Proceedings Act, 1947 of the United Kingdom in respect of claims against the Union and the States based on tort is needed and, if so, to what extent."[33] The Commission in its Report has further confirmed the ambiguous nature of the existing state of the law but has not made any concrete recommendation as to when the state should be held liable.[34]

II

DISCOVERY OF DOCUMENTS

Among the privileges of the Sovereign, the rules relating to discovery of documents need a special investigation. Ambiguity of varying degree exists with regard to rules and practices in the United States, England and India.

(i) *United States*

In the United States the rules on discovery of State documents are not very precise. Each departmental head is authorised to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it.[35] Departments have framed regulations forbidding their subordinates to disclose any documents without

[30] Law Commission of India : Report, *op. cit.* pp. 5-6.

[31] For instance, *Jehagir v. Secretary of State*, 6, Bom. L.P.131 (defamation contained in a resolution issued by Government) ; *P & O Steam Navigation Co. v. Secretary of State* (1861) S. Bom. H.L.R. Appl. (injury due to the negligence of servants of Government employed in a dockyard).

[32] *Vide Secretary of State v. Cockraft* (1914) 39 Mad. 351.

[33] *Vide* Law Commission Report, *op. cit.* p.1

[34] *Ibid.* (chapter on recommendations).

[35] R.S.S. 161.

the consent of the Attorney General.[36] But there is no clear list of governmental agencies which enjoy this privilege. Private parties seeking to *sub poena* records held by public agencies are often unexpectedly met by a claim that the agency is privileged not to disclose documents in its possession. Rulings on discovery are rarely appealable.

The courts in the United States have developed a theory of waiver. It consists mainly in an amorphous concept developed by case law. Generally the courts have rationalised their decisions on the following grounds:

(a) The nature of the information contained in the documents;
(b) The public or private character of the litigants; and,
(c) "Public interest".

Sometimes under the cover of the phrase "public interests" the privilege has been extended to protect disclosure which would merely hamper "efficient public service".

Although the Court of Claims may 'call upon any of the departments for any information or paper it may deem necessary' the head of the department may decline 'when in his opinion, such a compliance would be injurious to the public interest.'[37] Usually courts attach great significance to the opinion of the departmental head and his certificate is normally considered conclusive. It is observed that if the court finds that the document required is a military or international secret then it will always uphold the objection to its production. However, Wigmore observes: "It cannot be stated precisely what are the limits of these privileged state secrets, but the tendency is to limit them to pending international negotiations or military precautions against foreign enemies."[38] Nowadays, the requirements of military secrecy encompass an ever-expanding field of scientific and industrial research and technology. In order to protect strategic information related to military activity, the Atomic Energy Act invested the AEC with unprecedented powers. However, it was obscure in the original Act as to how the decision would be made on whether the particular information involved on secrets which, in the interest of national security, should be

[36] 11 Fed. Reg. 177A-107, Sub-para E.S. 51, 71.
[37] U.S.J.C. Tit-28 para, 272.
[38] Wigmore, *Evidence* (3rd. ed. 1940) 2378a.

kept from other nations, and, therefore, might not be introduced as evidence in open court.

While the reform of the law in this field is overdue, Mr. O'Reilly argues that making the Government subject to ordinary procedural duties in connection with discovery would be tantamount to permitting an independent suit for discovery against the Government, against which it would presumably be immune without its consent.[39]

(ii) *United Kingdom*

With regard to discovery of documents, the current practice in England is mainly guided by the well-known House of Lords case of *Duncan v. Cammell Laird & Co.* (1942). In the course of his speech Lord Simon L.C. said:

> The Minister . . . ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, *e.g.*, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

Earlier Lord Simon held:

> This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on the grounds of public interest, must as a class be withheld from production.

He added:

> that an objection validly taken to production on the ground that this would be injurious to the public interest is conclusive.

The general tenor of Lord Simon's speech is indicated by his quotation from Parker L.J. in the Zamora: "Those who are responsible for the national security must be the sole judges of what the national security requires."[40] Since the above judgement, Lord Simon's statement has become a kind of shibboleth. The practice has grown up for the executive to issue a certificate,

[39] See "Government Privilege Against Disclosure of Official Documents", *The Yale Law Journal*, Vol. 58, 1949.

[40] (1916) 2 A.C. 77, 107.

using Lord Simon's words, claiming a blanket privilege, as if pronouncing a spell to make all the documents taboo, irrespective of their nature or importance. As a corollary, it is equally settled that, once it is plain that production of documents would be prejudicial to the public interest, the court should preclude their production, whether the objection is taken in its proper form or not, or even if it is not taken at all.

Any claim based on national interest or national security is valid. But when the Minister refuses to produce a whole *class* of documents, none of which is apparently injurious in its contents, claiming privilege because of their source, then he must descend to some particularity. Lord Simon's decision has been weightily criticised.[41]

For some time, courts have been claiming a residual power to inspect documents, albeit an exceptional power and one very rarely to be resorted to. Lord Denning M.R. said: "The objection of a minister, even though taken in proper form, should not be conclusive. If the court should be of opinion that the objection is not taken in good faith, or that there are not reasonable grounds for thinking that the production of the documents would be injurious to the public interest, the court can override the objection and order production. It can, if it thinks fit, call for the documents and inspect them to see whether there are reasonable grounds for withholding them: assuring, of course, that they are not disclosed to anyone else. It is rare indeed for the court to override the ministers's objection, but it has, in the interest of justice, the ultimate power to do so. After all, it is the judges who are the guardians of justice in this land [*i.e.*, U.K.]: and if they are to fulfil their trust, they must be able to call upon the minister to put forward his reasons so as to see if they outweigh the interests of justice."[42] Commenting on this development

[41] See, *e.g.*, *Merricks v. Nott-Bower* (1965) 1 Q.B. 57; Grosvenor Hotel (No. 1), (1967) 1 Ch. 464; Grosvenor Hotel (No. 2), (1952) 1 Ch. 1210.

[42] As quoted in "Crown Privilege", *The Law Times*, Vol. 236, January 8, 1965, p. 19.
Earlier in June 1956, the Lord Chancellor maintained: "It is sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a judge. . . this ground, namely—the proper functioning of the public service—must be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a judge." See House of Lords Debates, June 6, 1956,

G. de N. Clark said: "It appears that the Courts are now seeking to recover some of the lost ground: partly as I have already indicated by their discovery that most of *Duncan v. Cammell Laird* was *obiter*; and partly by insisting that the Minister's affidavit should be made 'in proper form' and gradually laying down increasingly stringent requirements for what the proper form is . . . Discovery is, after all, a remedy in equity. It is perhaps not disrespectful to refer to these proceedings as a ritual dance, the only difference being that it is the courts and not the Executive who now appear to be leading."[43]

On November 12, 1964, the Lord Chancellor, Lord Gardiner made the following statement in the House of Lords:

> In future a Minister will not claim privilege for any document on security ground except after consultation with the Prime Minister. The question of Crown privilege in general will be examined by the Law Reform Committee as part of its inquiry into the law of evidence, and I am asking the Committee to give priority to this part of its inquiry.[44]

However, a very recent Appeal Court's judgement on this subject seems to have frustrated, once again, the hopes of optimists. On June 8, 1967, the Court of Appeal held in a majority decision [*Conway v. Rimmer*] that an objection, duly taken in proper form on behalf of the Crown, to the production of a document, on the ground either that the disclosure of its contents is contrary to the public interest or that it belongs to a class of documents which it is contrary to the public interest to disclose, is final and conclusive, and in neither case may the Court in England inspect the documents or take it upon itself to overrule the Crown's objection.

While claiming the Crown privilege in this case the Home Secretary did not suggest that the "contents" were in any way injurious to the public interest but asserted privilege for the

Col. 743; Also see, House of Lords Debates, March 8, 1962, Cols. 1191-1192.

In Scotland, the Court has an inherent power to override a Minister's certificate or affidavit. This power has been exercised twice in the last hundred years.

[43] *Vide* G.de N. Clark, "Crown Privilege", *Current Legal Problems*, 1966, pp. 106-107.

[44] House of Lords Debates, Vol. 261, Col. 423.

"classes" to which the required documents belonged. He did not condescend to say why it would be injurious to the public interest. But the Attorney General, contending that every document in the class must be kept back, said that the candour and completeness of such communications might be prejudiced if they were liable to be disclosed in litigation. No matter how harmless any particular document might be or however necessary to the cause of justice. No matter whether it helped or hindered the Crown. No exception could be made. The class must be kept intact, inviolate, undisclosed.

The Appeal Court's decision held that Duncan's case was a binding authority in English law, both as to contents cases and class cases, for the proposition that an objection by the Crown, if duly taken, was final and conclusive, and that in neither case might the court inspect the documents. Further, it was added that even if Lord Simon's observations on Duncan's case, with which all the other Lords concurred, were as to class cases *obiter*, the decision of the Appeal Court in Auten's case [*Auten v. Rayner*—1958 (1.W.L.R. 1300)], on facts very similar to those of the present case, was a direct authority binding the Court that in class cases as in contents cases the certificate or affidavit of the Minister was final and conclusive and that the courts could not go behind it.

While disagreeing with the majority decision, the third and senior judge—the Master of the Rolls, Lord Denning argued, in vain, that it was a suit between two private litigants; one had in his possession or power documents which were necessary to do justice between the parties. But the Attorney General had come to the Court and asserted a claim of Crown privilege. Lord Denning thought that the Court had a residual power in a proper case to override a Minister's objection if the objection was not taken in good faith or was not based on reasonable grounds, and could call for the documents and inspect them itself because the judges were guardians of justice in England, and if they were to fulfil their trust they must be able to call on the Minister to put forward his reasons in order to see if they outweighed the interest of justice. Lord Denning further held that Crown privilege was one of the prerogatives of the Crown. As such, it extended only so far as the common law permitted. It was for the judges, and not for any government department,

however powerful, to define its ambit.

Nevertheless, while dismissing the appeal the majority judgement was guided by the principle enunciated by the House of Lords in Duncan's case. This proves that controversy on discovery of documents and Crown's privilege is far from resolved in England.

(iii) *India*

The Indian Constitution does not make specific provision for state privileges in respect of production of documents in courts. However, the Constitution of India does preclude the jurisdiction of the courts to inquire into the character of advice tendered by the Minister.[45]

The Indian Evidence Act 1872 has a number of provisions on the subject of discovery. For instance, section 123 of the Act reads as follows:

> No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Two crucial, but vague phrases can be noted in this section, namely: "unpublished records" and "affairs of State". Whether the phrase "unpublished records" means "not published in the official Gazette", or "not for general information", has yet to be investigated. Similarly, what are and what are not "affairs of State" is again a multi-dimensional question. Further discussion on this point will be undertaken in the later part of this study. It may, however, be contended that in the case of India, where the Constitution is a written document which delegates specific powers to the Government, it should not be difficult to define the functions of the State.

From the point of view of determining the legal status of the public corporation in India, it is important to look at

[45] Article 74 provides:
"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.
(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."
This Section is based on author's article on a similar subject published in *Public Law*, Autumn, 1966.

section 124 of the Indian Evidence Act 1872 which says:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

In this section we cannot afford to overlook the term "public officer". At the same time it seems essential to make a reference to one patent clause[46] which is available in most of the Acts creating public corporations in India, which reads:

> All members, officers and servants of the corporation whether appointed by the Central Government or the Corporation, shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act to be public servants within the meaning of section 21 of the Indian Penal Code (XLV of 1860).

According to section 21 of the Indian Penal Code (XLV of 1860), the words "public servant" are used to describe an officer of government whose duty it is, as such officer, to prevent offences, to give information on offences, to bring offenders to justice, or to protect the public health, safety or convenience.[47] This section also covers every officer whose duty it is, as such an officer, to take, receive, keep or extend any property on behalf of government, or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of government, and every officer in the service or pay of government or remunerated by the fee or commission for the performance of any public duty.[48] It is also explained in the Indian Penal Code that persons falling under any of the above descriptions are "public servants", whether appointed by the Government or not.

It is interesting to note that the relevant clause quoted above, which is part of many Acts creating public corporations in India, is very similar to section 124 of the Indian Evidence Act (1872), which extends to all public officers the privilege of non-disclosure of communications made to them in official confidence when they consider that the public interest would suffer by such disclosure. It may be deduced that the public corporations and

[46] See, *e.g.*, section 56 of the Damodar Valley Corporation Act, 1948; section 81 of the Electricity (Supply) Act, 1948.

[47] *Vide* the Indian Penal Code (XLV of 1860). s. 21, Cl. 8.

[48] *Ibid.* Cl. 9.

the Government of India, being placed on the same footing, may enjoy the same amount of privilege in respect of discovery. In case this conclusion is adopted it would further contribute to the confusion which surrounds the concept of "suability" of the public corporation in India.

The following conclusions drawn from the above sections of this essay should justify the investigation undertaken in the following pages:

(i) The subject of governmental liability remains very confused and complicated in most legal systems, and particularly in those countries examined in earlier sections.

(ii) Recently, in the United States and England, Acts have been passed to abridge the doctrine of sovereign immunity. It has been noticed that in both countries Acts have proved of little value, and in some ways the limited applicability of the Acts has defeated the aims of such measures. In both statutes, apart from specific limitations, many provisions are imprecisely defined.

(iii) It remains true that States continue to enjoy several unspecified immunities while it remains equally obscure whether public corporations and their servants are servants of the Sovereign or not, and to what extent they be entitled to claim Sovereign immunities.

An attempt will be made in the remaining essay to classify the case law, in this field, under four categories: (a) the theory that the public corporation is a separate legal entity; (b) the functional test theory; (c) the dependence test theory; and (d) the public corporation as equivalent to Government theory.

III

(i) *The Theory of the Public Corporation as a Separate Legal Entity*

The doctrine that a public corporation specifically incorporated as a legal person is technically a unit separate and distinct from the Government; that it is subject to the liabilities and charges of private and public law, and is not eligible to partake of the sovereignty of the State unless the statute stipulates the

contrary, gets support from some well-known jurists[49] and in the language of some court decisions.[50]

The advocates of this theory hold that the public corporation, though entirely owned and completely controlled by the Government, is a separate entity subject to suit on its own part, and that the relation between it and the Government is not that of principal and agent but of stock-holder and corporation, the acts of the corporation not being the acts of its sole stockholder.[51] The ownership of a corporation by the Government and the appointment of its officers does not clothe that corporation with the character of a sovereign, and the corporation must stand in court as a private litigant. Public corporations ought to be liable, or the Government ought to be suable when it engages in industrial and commercial operations.[52] The advocates of "distinct entity theory" also hold that the agents of a corporation are not agents of its stockholder, the Government. Nor is it entitled to priority in bankruptcy for its business because its powers are not essentially different from those possessed by private corporations. They also believe that a public corporation cannot plead *ultra-vires* as a defence to an action on a contract, in that its business is essentially private.[53]

Professor Friedmann, the chief exponent of this theory, advances the following reasons in support of this doctrine[54]:

Firstly, he says that there are various provisions in all the new English public corporations which indicate the legislative purpose of putting the public corporation on substantially the same footing as private companies. For instance, there is a patent provision which states: "Nothing in this Act shall be deemed to exempt the Corporation from liability for any tax, duty, rate, levy or other charge whatsoever, whether general or

[49] *Vide* W. Friedmann, "The Shield of the Crown", *The Australian Law Journal*, 1950, p. 277; also his "The Legal Status and Organisation of the Public Corporation", *Law and Contemporary Problems*, 586 (1951); G.L. Williams, *Crown Proceedings*, 21-8, 30-7, (1948); "Litigation with Nationalised Industry", *II, The Law Journal*, 312 (1946, June 14).

[50] See *Panama R.R. v. Curran*, C.C.A. 5b. (1919) Fed. 768; *Tamlin v. Hannaford* (1950) 1 K.B. 18.

[51] *Vide Panama R.R. v. Curran, op. cit.*

[52] See *Gould Coupler Co. v. Fleet Corporation* (1919) 61. Fed. 716, 718.

[53] *United States v. Strong* (1921) 254 U.S. 491, 393.

[54] W. Friedmann, *op. cit.* pp. 586-88.

local." Another typical provision is :

(i) The Public Authorities Act, 1893, and section 21 of the Limitation Act, 1939, shall not apply to any action, prosecution or proceeding against the Corporation, or for or in respect of any act, neglect or default done or committed by a servant or agent of the Corporation in his capacity as a servant or agent of theirs.

(ii) In their application to any action against the Corporation section 2 and 3 of the Limitation Act, 1939 (which relate to the limitation of action of contract and tort, and certain other matters) shall have effect with the substitution for references therein to six years of reference to three years.

Secondly, Professor Friedmann holds that incorporation is the cardinal distinction of the public corporation. The very purpose of specifically incorporating a body should be enough to separate it from Government departments. To emphasise this point he quotes one important dictum by Atkin L.J. in *Mackenzie-Kennedy v. Air Council* (1927),[55] which states that 'if the Air Council were a genuine corporation instead of a Committee of Government officials he would be prepared to hold that it was liable in tort to the acts of its servants . . . If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.' While pursuing this point further, Professor Friedmann holds that in case an authority is intended to be a part of the Government in spite of its corporate capacity then it is brought out clearly by certain differences in the drafting of the relevant statute. For example, some of the social services corporations are specifically assigned their functions 'on behalf of' the Executive. Thus, the Town and Country Planning Act, 1947, stipulates that 'the functions under this Act of the Central Land Board, and their officers and servants shall be exercised on behalf of the Crown.' The National Assistance Board, (now absorbed in the new Ministry of Social Security) which administers assistance to

[55] (1927) 2 K.B. 517. at 533.

persons . . . without resources to meet their requirements in supplementation of the National Insurance Act, 1946, also exercises its functions 'on behalf of the Crown'.

Thirdly, Professor Friedmann believes that the principle of equality before the law, in an economy of mixed public and private enterprise, demands the greatest possible degree of equal treatment of legal persons, except where over-riding considerations of public policy demand the privileged treatment of public corporations.

However, the theory that a public corporation specifically incorporated is to stand in court as a private litigant and that it cannot claim for purposes of litigation any immunities and privileges whatsoever of a servant of the Crown can be criticised on the following grounds:

Firstly, the protagonists of this theory state that since public corporations are not exempted from liability for any tax, duty, rate, levy or other charge, they stand substantially on the same footing as other persons or corporations similarly employed. This argument does not convince us. In the case of Government departments, all revenues go to the Treasury and all expenditures are appropriated by Parliament. It is clear that if there are profits on the account of a particular department they remain with the Treasury; the department concerned has no claims over the surplus. Again, in the case of those departments which have been granted the facility of establishing self-revolving funds, as in the case of the British Post Office,[56] and the Indian Railways, such departments are under an obligation to contribute a specific amount to the Consolidated Fund every year. Obviously, those public corporations which are entrusted with the operation of big economic enterprises must share the financial burdens of the State. Since their revenues and liabilities are bound to vary every year it would not be possible to fix up and to specify their contributions to the Consolidated Fund of the State. Therefore, it is justifiable for such institutions to pay according to their capacities. We do not think there is

[56] W.A. Robson (ed.), *Public Enterprise* (1937), p. 304.
The British Government has recently decided to convert the Post Office from a Government Department—the status it has enjoyed for over three hundred years—into a public corporation because growing business of the Post Office cannot thrive if it is subject to close scrutiny in the House.

any substantial difference in this respect between these public corporations and government departments.

Moreover, public corporations are not taxable in all countries. In fact, no consistent policy has been followed on this subject anywhere. The case histories of more than one hundred years in the United States prove that the American courts have, by and large, respected the doctrine that 'a state may not impose taxes upon instrumentalities of the Federal Government.'[57] They are regarded by the Treasury as instrumentalities of the Government. Moreover, it is believed that to tax them would serve no purpose, since any profits which they make would ultimately accrue to the national government anyway.[58] In some of the statutes involving federal corporations, Congress has specifically mentioned what shall, and shall not be tax exempt.[59]

In India, under the Constitution, the property of the Union Government is exempt from taxation, except insofar as Parliament may by law provide, unless such a tax was levied immediately before the commencement of the Constitution.[60] The property and income of the State Government are also exempt from Union taxation. This exemption does not, however, prevent the Union Government from imposing a tax (such as Parliament may by law provide) in respect of a trade or business of any kind carried on by or on behalf of a State Government except insofar as any class of trade or business is declared by Parliament to be incidental to the ordinary functions of Government. But public corporations in India are taxable like ordinary companies. This policy is supported on the grounds that uniform taxation of public and private enterprise would ensure

[57] See John Thurston, *Government Proprietary Corporations in the English-Speaking Countries* (Harvard University Press, 1937), p. 66; also see R. H. Schnell, "Federally Owned Corporations and their Legal Problems", *North Carolina Law Review*, 1935-36.

[58] *e.g.*, *U.S. Housing Corp. v. City of Watertown*, et (D.C. Md. 1919).

[59] On the other hand, Soviet public Corporations are required to pay taxes on their turnover and surplus profits. Local taxes are also exacted for the use of buildings belonging to a local administration, or for the use of nationalised land. The surplus profit tax is not computed until amortization as well as workers' social funds and bonuses have been deducted from the profits.

[60] *Vide* Constitution of India, article 285.

conditions of equality in operation and fair competition. It should also increase efficiency by providing an incentive to public enterprise to render a good account of its operation in terms of net financial results.[61] Obviously, taxability of the public corporation is an inconclusive factor.

Secondly, Professor Friedmann holds that the presumption should be that if a public authority is specifically incorporated as a legal person it is subject to the liabilities and charges of private and public law. For this argument he draws rather too heavily on a dictum by Atkin L.J. in *Mackenzie-Kennedy v. Air Council*. The extent to which incorporation of a public corporation is a sufficient test to determine the legal status of an institution is difficult to assess since the courts have given conflicting decisions on this account. So much so, that in the same case (*i.e.*, *Mackenzie-Kennedy v. Air Council*) Bankes, L.J. states in his judgement: "In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, *and even if they were to be treated as one the respondent's position would not be improved.*"[62] The italicised part of this dictum seems to be of enormous significance. In fact modern statutes confer corporate capacity on Ministers (*e.g.*, Ministry of Civil Aviation, 1945, s.6, i; Ministry of Fuel and Power Act, 1945, s.6, i) and this does not in any way impede those Ministers being entitled to the immunities or servants of the Crown.[63] That corporate capacity is a matter which may be disregarded in determining whether such immunity exists is shown by *Roper v. the Commissioners of H.M. Works and Public Buildings*.[64]

The limitation of this test is further confirmed in the case of public corporations in India. There is one typical provision available in most of the Indian Acts which reads as follows:

(i) No suit, prosecution, or legal proceedings shall lie

[61] *Vide* Government of India, Taxation Enquiry Committee Report, Vol. I, p. 204.

[62] (1927) 2 K.B. 517 at p. 523.

[63] *Vide* "The Litigation with Nationalised Industry", *The Law Journal*, June 14, 1946, p. 311.

[64] (1915) I K.B. 45.

against any person in the employment of the Corporation for anything which is in good faith done or purported to be done under this Act.

(ii) Save as otherwise provided in the Act no suit or other legal procceding shall lie against the Corporation for any damage caused or likely to be caused by anything in good faith done or purported to be done under this Act.[65]

Yet every Act creating a public corporation in India opens with the provision that :

> The said corporation shall be a body corporate having perpetual succession and a common seal, and shall by the said name sue and be sued.

Much weight must not, therefore, be given, for the purpose of deciding whether a public corporation is in the position of a servant of the Sovereign, to the fact that it has corporate capacity.

Professor Friedmann's final argument is based on the principle of equality of all legal persons, public or private, before the law. He does not seem to realise all possible dangerous consequences which might follow if his view is adopted seriously and the public corporation is treated like a private company in the court of law. We do not think there is much common ground between the public corporation and the private corporation saving the common term 'corporation'. No doubt both may deal in business and industries but they do differ in the intentions behind their activities—public corporations serve public interests whereas private corporations serve private interests. Therein lies the whole difference which Professor Friedmann could conveniently afford to overlook while taking this extreme stand.

In spite of all its drawbacks, if this theory is adopted seriously, although there is little likelihood of that, a number of problems are bound to arise to which it would be difficult to find satisfactory answers. For instance, it may be asked: If a public corporation is not a state agency, how does the term "public" apply? Has a public corporation any rights distinct from the rights of the State itself? For instance, can it set any goals for

[65] See, *e.g.*, The Damodar Valley Corporation Act, 1948, s. 82; The Life Insurance Corporation Act, 1956, s. 47.

itself? Can it dissolve or reconstitute its board without the will of the State? Who stands behind a public corporation and whose will and interests does it represent in the legal relationships into which it enters? If the assets transferred to a public corporation do not any longer belong to the State then inevitably the question arises on what legal basis are these assets transferred from the State to a corporate board? This theory, being inappropriate, is hardly applicable. So it may be ruled out.

(ii) *The Functional Test Theory*

There is a view, almost a doctrine, supported by quite a number of court decisions that in determining whether any given body is a part of the general government of the country and in this sense 'the hands of the Sovereign', it is material to consider the nature of the function or office—whether its essential character is *governmental, i.e.*, implies the exercise of authority, or whether it is the mere substitute for private enterprise (either in the way of profit or of philanthropy); whether it belongs to the general welfare of the country or to the special interest of some part of it; the history of the function or the organ in the particular community; and the control or direction under which it is exercised.[66]

There are some earlier court decisions on record[67] which state that an authority or corporation must be regarded as outside the exemption of the Sovereign unless it can substantiate a claim to exemption by statute, or on the ground that it is by its origin or history closely associated with the State, so that it may be regarded as having emanated from the Sovereign in a similar manner to the great Departments of State; or apparently unless it was created for the purpose of dealing with or controlling State property, or for the purpose of discharging duties previously performed by another exempted department (just as with the British Post Office which will become a public corporation in the near future). New duties assigned by Statute to a corporation or department which was exempt would not vary its

[66] *Vide* Harrison Moore, "Liability for Acts of Public Servants", *The Law Quarterly*, January 1907, p. 20.

[67] See G.E. Robinson, *Public Authorities and Legal Liability* (Chapter II, 1925); J.A.G. Griffith, "Public Corporations as Crown Servants", *University of Toronto Law Journal*, 1952.

character, unless it clearly appeared by the Statute that such was the intention of the Legislature. In the case of a new authority created by Statute, if the Statute is silent as to the liability of the authority, we must ask what is the purpose for which it was created.

There is a classic judgement of Mr. Justice Blackburn in *Mersey Docks v. Gibbs*[68] in which "it was established . . . of corporations like the present, formed for trading and other profitable purposes, that, though such corporations may act without reward to themselves, yet in their very nature they are substitutions, on a large scale, for individual enterprise. And we think that, in the absence of anything in the Statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that improved by the general law on the owners of similar works." This principle was further consolidated in the case of *Coomber v. Justices of the County of Berks*[69] where the building of a court of assizes was held to be a proper and "inalienable" government function. These earlier cases were followed by a large number of cases which laid down the principle that whenever property was occupied for "public purposes", the exemptions of the Crown were extended to it.[70]

But one may ask: what are governmental functions? No attempt has ever been made to define what purposes or functions are governmental.[71] In certain cases the employment of public funds has been held to indicate the nature of purpose(s). For instance, in 1865 in *Mersy Docks and Harbour Board v. Cameron*,[72] Mr. Justice Blackburn said: "If property be occupied for the benefit, not of a number of individuals more or less defined, but for the benefit of the public at large, then it is not ratable . . . whether occupiers for the service of the general government are exempt on the ground that they represent the

[68] *Mersey Docks v. Gibbs*, 11 H.L.C. 686 at p. 707; 11/E.R. 1500 at pp. 1908-9.
[69] (1883) 9 A.C. 61.
[70] *Vide* G.E. Robinson, *op. cit.* p. 19.
[71] *Vide* J.A.G. Griffith, *op. cit.* p. 178.
[72] (1864) II. H.L.C. 443, 484.

Crown, may be doubtful. It should rather seem that they are exempt because they occupy for public purposes." In certain decisions it has been suggested that one should consult the original history of the function(s) undertaken by a given public authority. For example, cases dealing with the status of the Postmaster General in England have been influenced by the history of the Post Office and by the fact that it forms a branch of the revenue. It has already been mentioned earlier that according to the theory of functional test, new duties assigned by Legislature to a corporation or department which was exempt would not vary its character, unless it clearly appeared by the Act that such was the intention of the Legislature. It was according to this principle that in 1906 in *Bainbridge v. Postmaster General*,[73] it was held that the Postmaster General, who was incorporated for some purposes, could not be sued in tort, although in his corporate capacity he represented telegraph companies whose functions had been transferred to him. His immunity was upheld, although the telegraph companies which he succeeded would have been liable.[74]

The whole theory of the functional test can be summed up thus: If the function is governmental the corporation shares the privileges and immunities of the sovereign; if it is proprietary it is subject to the limitations and liabilities of private enterprises. The earlier cases suggest two tests to determine whether the purposes of the corporation are "Governmental": (i) the employment of public funds; and (ii) the original history of the function(s).

This theory can be criticised on the following grounds:

(a) It is illogical in the case of those countries which have a written and documented constitution.
(b) It is primitive and obsolete for the United Kingdom.
(c) There are conflicting decisions on the employment of public funds test.

The theory of the functional test is not valid in the case of countries like India[75] and the United States where the constitution is a written document which delegates specific powers to the

[73] (1906) 1 K.B. 178.

[74] For critical study of this court decision see W.H. Moore, "Liability for Acts of Public Servants", *The Law Quarterly Review*, 1907, p. 12.

[75] It may be contended that in the case of India, where the Constitution is

Government. In the case of such a country, the Government, within the limits of the powers vested in it by the constitution, can do whatever is necessary to the exercise of its functions. Parliament cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Government. But once it is established that the purpose is legitimate and is within the scope of the constitution, then all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the

a written document which delegates specific powers to the Government, it should not be difficult to define governmental functions. In fact, experts who have tried to define the functions of the State have found it an exceedingly difficult task.

Actually the distribution of legislative powers in the Indian Constitution has particular peculiarities which are not usually found in written constitutions. For it attempts to elaborate all possible subject-matters of legislation and the lists have been made as exhaustive as possible. Apart from the Union List and State List there is a Concurrent List of significant length. Further, the founding fathers constituting India as a sovereign and democratic republic also constituted it as what is popularly known as the "welfare" or the "social service" State. They enshrined the rights of the community in Part IV of the Constitution under the heading "the Directive Principles of the State Policy" in Articles 36-51. It is a part of the Constitution that these Directive Principles shall not be enforceable by any court. Nevertheless, they are "fundamental" in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Again, the fundamental rights have been expressly laid down in Part III of the Constitution. It must be kept in mind that the fundamental rights provided in Articles 14-31 are not absolute rights. They are necessarily qualified or restricted by law in the general public interest. The Indian Constitution is very much hedged with provisos and *non-obstante* clauses. Experts who try to define the scope of functions of the State in India usually get into the controversy over "Rights" and the "Directives". So far as the existence of "State Functions" is concerned, we must constantly keep in view that the phrase "governmental functions" has to be construed according to the spirit of the time in which particular legislation is enacted. This implies, under the Indian Constitution, that a public corporation cannot be created for its own sake or for private purposes. The functions which have been assigned to such corporations must be essential or incidental to its proper functioning and not outside the granted powers by the Constitution.

See R.S. Arora, "Rise of the Public Corporation in India : Some Constitutional Aspects", *Public Law*, 1961, pp. 362-385.

letter and spirit of the constitution, are constitutional.[76] This means that under a written constitution, a public corporation cannot be created for its own sake, or for private purposes. The end for which the corporation is to function must be within the express, or implied powers of the Government. Moreover, the functions which have been granted to such a corporation must be essential or incidental to its proper functioning and not outside the granted powers. For instance, Maurice S. Culp has justified the constitutionalities of all public corporations created in the United States under the New Deal programme, according to one or the other constitutional provisions—(i) National Defence; (ii) the Commerce Powers of the Central Government; (iii) Fiscal Powers; and (iv) the General Welfare Clause.[77] Similarly, in India all public corporations have been established according to one or the other constitutional powers of the Central Government.

In Britain, where the Constitution is unwritten and Parliament is supreme such a theory seems invalid. The functions of government were considered to be more or less limited in the 18th and 19th centuries. But what might have been viewed in those days as an improvident or even dangerous extension of state activity may today be deemed indispensable. One must not forget that the role of the state in Britain has changed. Let it be not ignored that the 'Agenda' of the State has been revised. It may be remarked that the advent of nationalisation in Britain marks the entry of the Government into business "in a big way"; that there is now, therefore, an extension of the functions of government, so that it includes not only all that previously was thought to be included in the function of governing but also trading in selected industries.[78]

There is an important dictum of Latham, C.J. in the *Uniform Tax Case*[79] which says : "There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a state. Some would limit them to the administration of justice and police and necessary associated activities. There are those who object to state action

[76] *e.g.*, *McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316 (1819). 421.

[77] Maurice S. Culp, "Creation of Government Corporations by the National Government," *Michigan Law Review*, Vol. 33 (1935).

[78] (1942) 65. C.L.R. 373, 423.

[79] "Litigation with Nationalised Industry", *The Law Journal*, *op. cit.* p. 312.

in relation to health, education, and the development of national resources. On the other hand, many would regard the provision of social services as an essential function of government. It is not for the court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within the functions of government, between essential and non-essential or between normal and abnormal. There is no sure basis for such a distinction."

The British Parliament is supreme in powers and its functions are dynamic in nature; any reference to set functions of the state must be illusory, because its functions have never been set out. Therefore, it would be still more ridiculous to consult any classic history of a function to decide whether it is governmental or proprietary. In certain cases there may not be any history even to consult, as in the case of production and control of Atomic Energy.

Judicial awards on the status of public corporations based on the principle of employment of public funds are equally conflicting. On the one hand, for instance, in 1919, in *United States v. Coghlan*[80] the district court for Maryland said, "It was shown that all the stock of the Fleet Corporation was owned by the Government, and that all it did was done for Government account, and that all profits which it made accrue to the Government, which would have to stand all the losses. Under such a state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the Government. It suffices that it is a Governmental agency, exclusively employed in Governmental work, and as such its property is not liable to state taxation." This decision was followed in the case of *United States Housing Corporation v. City of Watertown*,[81] and thereafter in quite a number of cases. On the other hand, in an equally large number of cases it has been held that even if a public corporation is entirely owned by the government it is still a separate entity subject to all limitations and liabilities on its part, and that the relations between it and the Government are not that of principal and agent but of stockholder and corporation, the acts of the corporations not being the acts of its sole stockholder.[82] We,

[80] *United States v. Coghlan* (D.md. 1919) 261 Fed. 425, 426.

[81] 113 Misc. 679, 186 N.Y. Supp. 309 (1920).

[82] *e.g., Panama R.R. v. Curran, op. cit.; United States, V. Strange* (1921) 254.U.S. 491.493.

therefore, submit that the whole functional test theory is misconceived and incapable of practical application in any dynamic state.

(iii) *The Dependence Test Theory*

Recently, another theory, named as "the dependence test theory" has been developed to determine whether any public authority is entitled to Sovereign privileges. This theory states that in considering whether any subordinate body is entitled to Crown privileges, the question is not so much whether it is an "emanation of the Crown",[83] but whether it is properly to be regarded as the servant or agent of the Crown,[84] and for that purpose the only test is the nature of relationship between the public authority and the Crown,[85] in the shape of the control exercised over it by the Minister of the Crown.

In favour of this theory it is advocated that the public corporation has no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures but is guaranteed by the Treasury. If it cannot repay, the loss falls on the consolidated fund of the Government; that is to say, on the tax-payer. Indeed, the tax-payer is the universal guarantor of the corporation. But for him it could not have acquired its business at all. In return the tax-payer is clearly entitled to have his interest protected against extravagance or mismanagement. The protection of his interest and the interest of the general public is entrusted by Parliament to the Minister of the Crown. Therefore, the only fact which can be said to make the public corporation a servant or agent of the Crown is the control over it which is exercised by the Minister of the Crown.[86]

Professor J.A.G. Griffith holds that this test is analogous to the common law tests.[87] The common law used to base its definition of a servant on the nature of the control exercised by

[83] This phrase was first used in *Gilbert v. Corporation of Trinity House* (1886) 17 Q.B. 795, 801.

[84] *International Railway Co. v. Niagara Parks Commission* (1941) A.C. 328. 392-3.

[85] J.A.G. Griffith, *op. cit.* p 184.

[86] *Vide Tamlin v. Hannaford* (1950) 1 K.B. 18.

[87] J.A.G. Griffith, *op. cit.* pp 184-5.

the master; today, the existence of a contract of employment is generally accepted by the courts as sufficient proof of the master-servant relationship . . . The relationship of public corporations to the Crown is not to be found in any private agreement, but in a public act of Parliament. It is further held that the statutory relationship of the Crown to the different public corporations varies considerably. Some public corporations enjoy a large amount of independence from the Crown; others are treated almost as "employees" of the Crown. It is suggested that this distinction is significant and that in the test of "dependence" lies the answer to the problem. Professor Griffith classifies on the basis of what is called the "dependence test theory" all the new British public corporations into three categories.[88] Any particular corporation should be sufficiently dependent on the Government to be classified as a Crown servant.

The only and the most significant court decision given on this basis is one by Denning L.J. in *Tamlin v. Hannaford*.[89] Such a court decision should be closely examined for if it is sound, its implications for the problem of the status of public corporations are great.

The plaintiff in *Tamlin v. Hannaford* (1949) 2 All E.R. 327 was the lessee of a house formerly owned by the Great Western Railway Company, and now vested (under the Transport Act, 1947), in the British Transport Commission. The defendent was sub-tenant of two rooms in the house which constituted a separate dwelling within the meaning of the Rent Restriction Acts. The plaintiff sued for possession and the county court judge held that the house must be regarded as owned by the Crown and administered by the Transport Commission as its agent and that since the Crown is not bound by the Acts, an order for possession must be made. The Appeal Court was to decide whether the Rent Acts applied to houses vested in the Commission. The answer to this problem depended on the further question as to whether the Commission was a servant or agent of the Crown. It is, of course, an established rule that the Crown is not bound by a statute unless there can be gathered from it an intention that the Crown should be bound; thus in the case of the Rent Acts it has been held that the Crown and its servants are not bound

[88] J.A.G. Griffith, *op. cit.* pp. 185-90.
[89] (1950) 1 K.B. 18.

by their provisions.[90] So in the litigation concerning Mrs. Hannaford's two rooms the court had to determine what was the nature and legal character of the greatest of all the nationalised industries in Britain.

While reading the judgement of the Court Denning L.J. said:

> The protection of the interests of all these—tax-payer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the Commission and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the share-holders or even of a sole share-holder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by acts of Parliament as any other subject of the King. It is of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of Government.[91]

It has been pointed out in the judgement that the railway companies have been amalgamated under the Railway Executive, an agent of the Transport Commission, which is subject to the same rights and liabilities including statutory duties, contractual

[90] *Territorial and Auxiliary Forces Association of the County of London v. Nicholas* (1949), 1 K.B. 35.

[91] (1950) 1. K.B. 18 at pp. 23-24.

obligations, and even some customary obligations, as were the companies. Execution can be levied against the property of the Commission, whereas that is not possible against a government department. He then distinguished the Territorial Army Association, on the ground that it concerned defence "which is essentially the province of government", and the Post Office on the ground that the carriage of mail was a Crown monopoly long before the Postmaster General was incorporated. But, he said, "the carriage of passengers and goods is a commercial concern which has never been the monopoly of anyone and we do not think that its unification under state control is any ground for conferring Crown privileges upon it. Finally, Denning said:

> The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is an ample authority both in this court and in the House of Lords for saying that such control as he exercises is insufficient for the purpose. (see *Cannon Brewery Co. Ltd. v. Central Control Board/Liquor Traffic*).[92] When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of Central Land Board by the Town and Country Planning Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.[93]

Therefore, it was held that the British Transport Commission is not a servant or agent of the Crown and its property is as much subject to the Rent Restriction Acts as the property of any other person.

As a result of this court decision it has been widely considered that a long standing important constitutional question had been settled in England, that commercial corporations would not participate in any remaining Crown privileges.[94]

[92] (1918) 2 Ch. 101, 113; (1919) A.C. 744, 757.

[93] (1950) 1. K.B. 18 at p. 25.

[94] *Vide* W. Friedmann, "The Legal Status and Organisation of the Public Corporation", *Law and Contemporary Problems*, 1951, p. 589.

In our opinion, the "dependence test theory" is subject to some serious limitations. Since it gets maximum support from the above quoted court decision, it would be appropriate to examine carefully this important judgement before we discuss the limitations of the test itself.

We respectfully submit that the decision of the Court of Appeal is regrettable and full of contradictions.[95] *Firstly*, His Lordship said that 'the carriage of passengers and goods is a commercial concern which has never been the monopoly of any one and we do not think that its unification under state control is any ground for conferring Crown privileges upon it'. In reply to this point may we submit that the nationalisation of transport in England does not mean unification under *state control*, as the learned judge observed. Rather it is a unification owing to *state ownership*. The State may control either by regulating an enterprise, leaving the ownership in private hands; or by taking over the enterprise so that the state becomes the owner. In the case of the British Transport industry the latter course was followed and the control by the State flows from the ownership of the State. It is submitted, therefore, that Denning's use of the phrase "state control" is misleading because it seems to infer that the action of the State was designed to regulate a private enterprise.

Secondly, it was said in the judgement that the Commission was not expressly stated to be acting on behalf of the Crown. It may be asked then on whose behalf the Commission is working? The Transport industry in the U.K. no longer belongs to private companies; if it does not belong to the State either then to whom does it belong? Let it be submitted that the ultimate ownership of the British Transport industry is the ownership of the state whereas the operation of industry has been entrusted to the Transport Commission.

Thirdly, His Lordship pointed out that the Commission was not exempted from the obligations which bound the railway companies which it superseded. It seems to us, with respect, that this argument is not conclusive one way or the other.[96] But it is evident that the State has acquired ownership not

[95] *Vide* J.A.G. Griffith, "Public Corporations As Crown Servants", *Modern Law Review*, 1949.

[96] *Ibid.*

for commercial purposes, nor for the benefit of a number of individuals, but for the benefit of the public at large, whereas the private railway companies worked for the benefit of their share-holders. In view of this cardinal difference why is it presumed that the Commission is bound by all limitations and liabilities applicable to a private company?

Fourthly, the learned judge observed that the execution was liable against the Commission. In reply to this argument we submit that again this reason is also not conclusive. The courts have been facing a good deal of difficulty with respect to levy or sale of the property of a public corporation under execution of a judgement against it. Following the theory that the assets of the corporation are more or less the assets of the State and that any interference with it would hinder the operations of the Government, the courts have sometimes disregarded the corporate entity and have declared the corporation's property exempt from execution.[97]

Finally, the most important argument on which the whole judgement rests is unfortunately self-contradictory. To appreciate the full significance of the argument it is essential to reproduce here the relevant parts of the judgement. His Lordship said :

> ". . . the significant difference in this corporation is that there are no shareholders to subscribe the capital . . ."[98]
>
> "He (*i.e.*, the tax-payer) is clearly entitled to have his interest protected against extravagance or mis-management."[99]
>
> "The protection of the interests of all these—tax-payer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. *He is given powers over the Corporation which are as great as those possessed by a man who holds all shares in a private company*, subject, however

[97] (i) In case of those countries where the State cannot be sued, public funds cannot be reached indirectly by attachment or garnishment.
(ii) In the case of India, for instance, in Section 38 of the Life Insurance Corporation Act it is provided that: "No provision of law relating to the winding up of companies or corporations shall apply to the Corporation established under this Act, and the Corporation shall not be placed in liquidation save by order of the Central Government and in such manner as that Government may direct." Also see The Damodar Valley Corporation Act, 1948. s. 57, ii.

[98] (1950) 1. K.B. 18, at p. 23.

[99] *Ibid.* p. 23.

as such a man is not, to a duty to account to Parliament for his stewardship."[100]

". . . Its (*i.e.*, British Transport Commission's) property is not Crown property."[101]

". . . There is ample authority both in this Court and in the House of Lords for saying that such control as he (*i.e.*, the Minister) exercises is insufficient for the purpose."[102]

Upon reflection, one can notice that earlier in the judgement, the learned judge observed that the Commission has no share-holders. The capital which the Commission needs is borrowed by it and its borrowing is guaranteed by the Treasury, that means by the tax-payer. Later on in the judgement it is declared that the Commission's property is not Crown property. It may be asked then whose property is it? Do the assets entrusted to the Transport Commission belong to the Commission, and if the Commission is its own master then how and why has the Minister of Transport been given powers as great as those possessed by a man who holds all the shares in a private company? If in the eye of the law, the Commission is its own master, can the Commission set goals for itself; can it reorganise or dissolve itself? Then again, at one place it is pointed out that to protect the interests of the tax-payer, user and beneficiary, the Minister of Transport has been given the maximum possible powers because he is accountable to Parliament for his stewardship. Later on the case was decided on the ground that the control over the Commission as exercised by the Minister is insufficient. This contradiction and inconsistency may give rise to innumerable questions which it would not be possible to answer. Obviously in view of all above mentioned inconsistencies it would not be appropriate to think that with this court decision our important legal problem dealing with the legal status of the public corporation is settled.

As far as the dependence test theory itself is concerned it is rather too early to comment upon its practical utility. So far it has been seriously applied in only one court decision which has been critically reviewed above. However, on theoretical

[100] (1950) 1 K.B. p. 23.
[101] *Ibid.* p. 24.
[102] *Ibid.* p. 25.

grounds it is very difficult to say what degree of dependence would be necessary to elevate a public corporation to the status of a State servant. According to Professor Griffith all publicc orporations which are running industrial and commercial enterprises, *i.e.*, the National Coal Board, the Gas and Electricity Councils and the Transport Commission do not qualify the status of Crown servants, being under the limited control of the Minister.[103] On the other hand, it is equally well established that the powers of appropriate Ministers with respect to all these public corporations are enormous.[104] To appreciate the full significance of public controls over public corporations both in theory and practice, the reader should consult a series of reports issued by the Select Committee on Nationalised Industries (appointed by the House of Commons). Briefly, the appointments of the Boards are universally in the hands of the competent Minister who is directed to appoint from among persons properly qualified. Since the Acts do not provide any fixed qualifications to guide the Minister for the selection of such members, therefore, the Minister's choice is final.

In each case the Minister is authorised to give directions with regard to the financial affairs of the corporation. The powers of the Minister are also connected with the use of any excess of the board's revenues, properly chargeable to revenue account over their outgoings for any financial year of the board. He is also empowered to control, generally, programmes of reorganisation and development involving substantial outlay on capital account, and to supervise training, education, and research. The Minister and Treasury can also exercise control over the powers of the corporations relating to temporary borrowing, the issue of stock and reserve fund. In case of those corporations which depend financially on the Treasury and Parliamentary appropriations, the control of these financial institutions would obviously be still greater. For example, in the case of the Atomic Energy Authority and the Airways Corporations the Government controls are elaborate.

Above all in each case the Minister is given power to issue

[103] J.A.G. Griffith, *op. cit.* p. 185.

[104] *Vide* David Coombes, "The Members of Parliament and the Administration: The Case of the Select Committee on Nationalised Industries", (London, 1966).

directions of a general nature, in matters which appear to him to affect the national interest, as to which he is sole judge, and the corporation is then bound to obey. This means the Minister may, by an order, limit the powers of the public corporation, to such an extent as he thinks desirable in the public interest.

Again, all public corporations are also directly accountable to Parliament through the Parliamentary Select Committee appointed to examine the 'Report and Accounts of the Nationalised Industries' established by statute whose controlling boards are appointed by Ministers of the Crown and whose annual receipts are not wholly or mainly derived from funds provided by Parliament or advanced from the Exchequer.[105]

In view of all these controls, under which each of the industrial and commercial public corporations is obliged to work, it would be a matter of extreme subjectivity to pronounce whether these controls are adequate to qualify these public corporations as Crown Servants. Such subjective judgements are bound to vary from person to person and from time to time. Obviously this is the most serious drawback of the theory.

(iv) *The Public Corporation as Equivalent in Nature to Government Itself*

The doctrine that all public corporations owned and controlled by the Government (chartered or authorised by Act of Parliament) are constitutional if their purposes are within the powers of Parliament and that they are instrumentalities of the Government, and therefore may act as the Government itself or as the distinct agent of the Government, has been made famous by many jurists[106] and various judges in their court decisions.

The propounders of this theory hold that the State itself cannot *directly* exercise possession over the entire mass of its property. As the sole owner of its property it can exercise possession only through its agencies, to whom State property is turned over for *operative* control. Some agencies representing the State as such function and operate *directly* in the name of

[105] See H.M's Government Order of Wednesday, November 27, 1957.

[106] See Harold Stoke, "Some Aspects of the Legal Status of Federal Corporations", *Geor'n Law Journal*, November, 1939; Harvey Pinney, "The Legal Status of Federal Government Corporations", *California Law Review*, 1939.

the State (*i.e.*, government departments). Others function and operate in the name of the State through a *special juristic form*, the form of the juristic person. Primary among these are, in the words of the law, public corporations which have been placed on a cost accounting basis and operate in business relations as independent juristic persons, not associated with the body of the State; that is, such public institutions or organisations as may, as such, acquire title to property, assume debts, sue and respond to suit in court. The utilisation of such juristic persons, especially for administering the tremendous and varied sphere of property relationships, which are formed on the basis of national ownership, is a historic necessity for the state at the present stage of our society's development. Therefore, the personification of such individual public corporations is a method of administering the economic and social functions of the State. Such juristic persons cannot set any goals for themselves, their goals are always set for them by the State.

The advocates of this theory hold that a public corporation, being an agency of the State, has no interests distinct from that of the State itself. It is the State which stands behind its commitments and credits, and it is State's will and interests which a public corporation represents in the legal relationships into which it enters.[107] Any other formulation of the matter inevitably involves counterposing the agencies of the State to the State itself, which is inadmissible.

A state agency (juristic person) is to the state as the part is to the whole. This means that property of the State, insofar as it is secured to a specific state agency, belongs to it and thereby to the state itself in the person of the given state agency.[108] It

[107] For instance, Marshall held in *McCulloch v. Maryland*, 4. Wheat (17 U.S.) 316 (1819), "Corporation is never the end for which other powers are exercised, but a means by which other objects are accomplished . . . the power of creating a corporation is never used for its own sake, but for the purpose of affecting something else." He further said, "Congress may not under pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government."

[108] For instance, in a very widely quoted court decision, the Court for Maryland held: "It was shown that all the stock of the Fleet Corporation was owned by the Government, and that all it did was done for Government account, and that all the profits which it made incur to the Government, which would have to stand all losses. Under such a state of affairs, it is unnecessary to inquire whether for all purposes the Fleet

could not be so since otherwise the agency would not be a state agency. If state properties attached to a public corporation no longer belong to the state, that would mean that practically nothing is left to the state.

That no public corporation has or can have any rights which are not at the same time the rights of the state itself, is the corollary of the above principle. If the state transfers this or that right to a stated juristic person for the accomplishment of specific tasks, as its agency, even after transfer it does not cease to be a right belonging to the state. In fact, the state agency's prerogatives are as a rule also its obligations towards the state. This principle finds its most distinct expression in the fact that the state as such (and not only as embodied in state agencies as juristic persons) can at any time and in any way exercise control, use and dispose of any property secured to any public corporation as a juristic person. Such authority of the state cannot be challenged because, if the assets transferred to a public corporation do not any longer belong to the state, then inevitably the question arises on what legal basis are these assets transferred from the state to a corporate board? It is rather asserted that the state can at any time make direct use of the prerogatives belonging to a public corporation as prerogatives of its agency.

This view gets its support from the language of some court decisions. For instance, in an action brought by the United States and the Spruce Production Corporation to recover damages for breach of a contract between the Corporation and the defendant it was held that the United States was a proper plaintiff. The court held that the Government was seeking to

Corporation is the Government. It suffices that it is a governmental agency, exclusively employed in governmental work, and as such its property is not liable to state taxation *(U.S. v. Coghlan/* D.Md. 1919/ 261; Fed. 425). An exactly similar attitude was taken in *United States Housing Corporation v. City of Watertown.* The Court held that a tax upon property owned by the Housing Corporation was invalid, saying, "in the instant case the property itself was the only means and instrumentality by which the federal purpose could be carried out, and to tax this property would be to tax an agency solely engaged in carrying out the constitutional duties of the general government. It would be a tax on the means employed to carry out a federal power and this. . .the municipality had no right to do."

enforce a right in which it had a real and substantial interest and consequently could join in a suit by a corporation owned by it.[109]

It follows that in the United States it has been held that the state should be treated as a real party in interest and that it might sue on contract made by a public corporation. This seems to be the interpretation of an Act of Congress permitting the President of the United States to dispose of property acquired by the Fleet Corporation.[110] The same dictum was applied in a number of cases.[111] So much so, in some of the cases the courts held with regard to the Fleet Corporation that the Corporation was acting only as the agent of the Government and not in its corporate capacity, and that the United States, as principal, could bring suit. Thus an action was sustained when brought by the United States alone to recover over-payment by the Fleet Corporation on a contract.

Another proposition which can be appended to the above principle, namely, that a state agency (juristic person) is to the state as the part is to the whole, is as follows: a fraud or a conspiracy against a public corporation is a fraud or a conspiracy against the state itself. In the United States in October, 1918, Congress, by amending section 35 of the Penal Code,[112] specifically made fraud a crime against United States owned stock. The term fraud was defined to include any attempt to present false claims, to steal personal property, to conspire to defraud by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, to deliver false receipts or vouchers from military or naval property, or to fraudulently deliver money or property used for military service, whenever a corporation in which the United States as a stock-holder is involved. The Act was held valid on the grounds that the United States can protect its property by criminal laws, and its constitutional powers would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly from itself and turned the property over to its creature. The creator would not be subordinate to its own machinery.[113]

[109] *Erickson v. U.S.* 264. U.S. 246, 49, Sup. Ct. 310, 68d.

[110] *Vide* H. Pinney, *op. cit.* p. 718.

[111] *Ibid.* p. 719.

[112] Act of October 23, 1918. 40 Stat. 1015 (1918) 18. U.S. C.A. 80, 83, 82, 84, 85, (1927).

[113] 263 U.S. 15 (1923) at p. 17.

Those who advocate that public corporations are instrumentalities of the Government and therefore they may act as the Government itself; they also hold that public corporations are as much entitled to immunity from giving discovery as any other proper department of the state. They argue that the documents of a public corporation, say of the National Coal Board (in U.K.) or of the D.V.C. (in India), are by no means less important as compared to, say, those of the British Post Office or of the Indian Railways. Similarly, economic and commercial documents of the state are not in any respect less significant than political and diplomatic documents of the Government. Again, from a 'house keeping' point of view, why should the National Coal Board be under any obligation to give discovery whereas for similar documents of the British Post Office protection may be claimed. Why should we ignore the rule, in case of public corporations, that the interests of the state must not be put in jeopardy by producing documents which would injure it. It is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation. In an important case *Robinson v. State of South Australia* (1931)[114] the court decided, "It must not be assumed . . . that documents, relating to the trading, commerce, contractual activities of the state can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be some plain overruling principle of public interest concerned which cannot be disregarded."

There is an interesting recent judicial decision on this point in *Seabrook v. British Transport Commission*.[115] Seabrook was killed by a train passing between two railway stations along the main line on which he was working while employed by the British Transport Commission. In an action brought by his widow, she sought production of accident returns and reports relating to Seabrook's accident. The Transport Commission claimed privilege from production of these documents. Havers J. dismissed the claims of Seabrook's widow and said, "I feel constrained to hold that the claim for privilege has been established."[116]

[114] (1931) 47 T.L.R. at p. 456.
[115] (1959) 1. W.L.R. at p. 509.
[116] *Ibid.* p. 529.

From a purely technical point of view, during litigation with a public corporation it may become essential for example for a litigant to get discovery of certain documents which, in fact, are not in the possession of the Board of the public corporation. Suppose that those documents are with the Minister who, being a Servant of the Crown, can claim protection and can refuse to give any discovery with effect to them. Or, suppose, the documents wanted in the court fall in the category of "top Secret" correspondence between the Chairman of a corporation and the Minister concerned and that correspondence cannot be disclosed by either side without the consent of the other party, and the Minister, being an interested party, may refuse to give his consent. Then what would happen? Generally speaking, in both cases protection can be claimed. In the first case, when the documents are lying with the Minister, he can decline to give any discovery of such documents, and in the second case, he can refuse to give his consent to the disclosure of such correspondence in view of public interest.

By moving one step further, we realise that individuals do not write memoranda to themselves nor do they keep any proceedings of their doings whereas the Government Department and public corporations do keep records of their doings and they also maintain proceedings. While individuals may claim discovery of such records of a public corporation whereas they themselves have nothing in return to produce in court. This one way traffic will certainly put a public corporation involved in a situation of disadvantage. Why should a public corporation undertake such obligation and give discovery under such circumstances?

The theory that all public corporations owned and controlled by the Government, and chartered or authorised by Act of Parliament are constitutional if their purposes are within the power of Parliament and that therefore they may act as the Government itself or as the distinct agent of the Government; seems to be nearest to reality. Such public corporations are mere artificial bodies, created for the sole benefit of the State; they function on State credit, with State funds and for State purposes. Obviously, they seem to be qualified to share all immunities of the Sovereign. This conclusion appears to be justifiable but its implications might be serious. *Firstly*, if all public corporations

are, *ipso facto*, governmental in character, then relations between public corporations are essentially relations between the State itself and are consequently not matters of the law. *Secondly*, strictures may be passed that the public corporation is the most privileged institution of the State—being not subject to any limitations as the regular government departments are and still equally entitled for all immunities of the Sovereign. Perhaps it may be asked: Why public corporation at all? *Thirdly*, if all the immunities of the Sovereign are extended to public corporations engaged in economic functions, the activities of such corporations are likely to be hindered, because those who were expected to do business with such corporations would always be suspicious of making engagements with them if they were uncertain whether these engagements with public corporations could be enforced in the court of law because whenever business transactions occur some sort of wrongful actions are bound to happen.

Whereas the above theory is sufficiently logical, the consequences are obviously so serious that they may shake the very roots of the institution of the public corporation.

We can conclude that the legal status of the public corporation remains ambiguous. No consistent policy seems to have emerged in the United States, England or India. In both Britain and the United States, the only countries where a substantial case study is available on this subject, the corporations have been sometimes reduced to the status of ordinary suitors before the courts, and the principles of law as they relate to private litigants have been applied, where it was considered that there would be no disadvantage to the State by so doing.[117] This means, when the interests of private persons could be served and protected, without seriously impairing the value of the instrumentality, the court has adhered to the doctrine of separate entity.[118] On the other hand, when a substantial interest of the State has been involved, or when the effectiveness of the agency itself seemed to be endangered, the court has denied the independent status of the corporation and has held that it shares the privileges of the Sovereign.[119]

[117] *Vide* Robert H. Schnell, "Federally Owned Corporations and Their Legal Problems, II", *North Carolina Law Review*, 1936.

[118] *e.g.*, *Tamlin v. Hannaford* (1950) 1 K.B. 25.

[119] *e.g.*, *Mackenzie-Kennedy v. Air Council* (1927) 2. K.B.

Pinney observes that the status of such government corporations before the courts is not certain beyond these inconclusive generalisations. Thus, he feels that the status of the public corporation is as yet judicially indeterminate.[120] None of the theories discussed in the previous sections leads us to an adequate solution. No analysis of the forms, controls, functions and essential elements of power furnishes any very satisfactory guidance to the legal status of a public corporation. The statutory provisions made in various Acts also serve as inadequate guides. Perhaps this inadequacy has been due, in part, to the fact that even legislatures have not had any clear idea before them of the exact place that these corporations were to hold in the administrative structure of government. Neither did they have in mind the position of these corporations in the legal order.

Consequently, today, a person in the legal profession does not know, when he takes up a case involving a public corporation, what branch of law is going to be applied by the court. So far, the courts have been applying partly private law, partly public law and partly their own philosophies. It is suggested, therefore, that the time is ripe to give coordinated thought to the subject of the legal status of the public corporation, and to the working out of a code on the rights and obligations of this widely employed institution.

[120] *Vide* Pinney, *op. cit.* p. 735.

III

The Politics of Public Relations of British Public Corporations

III

The Politics of Public Relations of British Public Corporations

"This campaign has no connection whatsoever with any political party. Its sole purpose is to oppose the nationalisation of rented homes, whether the threat to do so comes from the left or right."

—Rented Homes Campaign Committee statement
British General Election of 1959.

"This advertisement is not trying to sway votes in any political election. It is a legitimate attempt to build up a body of public opinion opposing the nationalisation of steel with a view to the withdrawal of the Labour politicians' threat to re-nationalise the industry. It is not your vote we ask for, it's your voice."

—An advertisement in the *Daily Herald*
British General Election of 1959.

In this essay an attempt will be made to discuss some important aspects of the public relations of the British nationalised industries, especially from the political point of view. An effort will be made to justify contention that those who were responsible for the nationalisation of basic industries in post-war Britain perhaps failed to estimate the exact significance of public relations of the public industries. Let their sincerity to serve their people not be doubted, rather they did try honestly to provide certain means of establishing contacts between the public industries and the public they serve. As a matter of fact, they could not predict that their wishes would be misinterpreted by their political opponents and by other organised groups, nor that the boards

of nationalised industries would be placed in a defensive situation, and that vast resources would be mobilized to influence the public relations of these industries for political and strategic gains.

I

The social implications of the conduct of industry received negligible attention under the competitive economic system. The protagonists of the capitalist system of economic organisation have laid too much emphasis on the theory of so-called "consumers' sovereignty", whereas the consumer has been the most neglected figure. His "sovereignty" has always led him to choose between unsatisfactory goods duly made attractive by advertising compaigns. The private producer has mostly enjoyed the power of imposing his own conditions as to price, output, or quality.[1] He, in fact, never got the training to think judiciously in terms of public welfare. The helplessness of the consumer led the State to intervene by means of anti-monopoly legislation, state-sponsored competition, state-regulation by fiscal, physical or monetary methods, and finally public ownership. Therefore, under private capitalism there has been no problem known as 'how to safeguard the rights of the consumer'. It is public ownership of basic industries which has brought up this problem.[2] The rights of the consumer are unique and private enterprise offers no counterpart.[3] It is interesting that the consumer who has continuously been exploited by the producer, perhaps ever since the middle ages has become suddenly conscious—rather over-conscious—of his rights, which have never been clearly defined with the appearance of a series of big public corporations.

At the same time, it seems rather strange that in Britain the Conservative leaders who had inherently registered their faith in private ownership, which in turn had always been indifferent to the rights of the consumer, has suddenly become the guardians of consumer's welfare. In stating its industrial policy in 1947, the Conservative Party pledged itself to 'strengthen

[1] *Vide* L. Freedman and G. Hemingway, *Nationalisation and the Consumer* (London, 1950), pp 3-5.

[2] *Vide* R. Kelf-Cohen, *Nationalisation in Britain* (London, 1961), p. 289.

[3] E.L. Johnson, "Consumer Control in British Nationalised Industries," *Journal of Politics*, 1953, p. 89.

the safeguards of the consumer against these (*i.e.* State) monopolies.'[4] The socialists who worked hard to promote transfers to public ownership were already motivated by the desire to rescue the consumer and the worker from exploitation by the capitalist. Purely from a political point of view, the Conservatives were justified in getting interested in consumers of nationalised industries, because that was the only field where they could finally give a tough fight to the socialists, that is by proving to the consumer that nationalisation could not necessarily deliver better goods and improved services. It seems that while the Labour Government between 1945 and 1950 was trying to make some statutory provisions for the safeguarding of consumers' interests, the Conservative Opposition adopted the attitude of warning the public against state monopolies.

Public relations of public institutions obviously constitute a two-way traffic, just like relations between the two individuals. Relations between X and Y will obviously be determined by what one thinks about the other. Again, forming an opinion about a particular individual or an institution is a problem, the solution of which is more or less influenced by various factors. Now reverting from an abstract example to our actual problem we do realise that relations between a public corporation and the public depend largely upon what the public corporation actually does for the public: how it serves its consumers; how it educates the people about its achievements and limitations and above all through the instrumentalities which it selects to publicise all these functions. On the side of the public, there is a comparative difficulty in ascertaining how it forms opinion about its public institutions. Partly it is true that the public forms an opinion about these institutions on the criterion of service—*i.e.*, 'how the public is served'. But public opinion is also influenced by many other factors. For instance, the public includes an enormous number of people who have not had sufficient intellectual training to think for themselves; somebody else, say public speakers, pamphleteers, poster-writers, politicians, newspaper editors, interested groups, etc., form opinion for them and the public adopts these views as presented or with due amendments. Of course, a section of the public does think for itself and forms independent judgement.

[4] *The Industrial Charter*, Conservative and Unionist Pamphlet, p. 26.

With reference to our problem we have been told time and again that both the Boards of nationalised industries and the public have expressed criticisms of relations existing at present.[5] We can neither offer any comments on this widely advertised statement, nor can we suggest any measures to improve these institutional relations until we have analysed the basic reasons for these unsatisfactory relations.

It seems to be necessary to say here that the nature and significance of nationalisation as it has been effected in Britain is quite different from public ownership in a totalitarian state. There are certain hard facts regarding the British nationalised industries :

Firstly, as pointed out by Kelf-Cohen, and supported by so many other observers, all the nationalised industries were in difficulties when taken over and some were in very poor shape. Inadequate supplies of dirty and sometimes incombustible coal were matched by frequent instances of load shedding, or voltage reductions which reduced electric light to a glimmer. The volume of street lighting was reduced. Reduction in gas pressures made the boiling of a kettle a prolonged trial, and to be sure of cooking your breakfast quickly you were wise to get up very early in the morning. And then there were the slow, dirty and crowded trains, often inadequately lighted and heated, which made the daily journey to and from work a misery.[6]

Secondly, all the nationalisation Acts legally prescribe that industries are to make their ends meet taking one year with another. This implies that an element of profit making has been legally eliminated. True, there has been a serious debate on the financial and economic obligations of public undertakings, however a committee report on this subject recently said: "In the Government's view there would be no advantage in altering the basic financial and economic principles which the nationalised undertakings are by their statutes required to observe. If, however, these principles are to provide a satisfactory basis for their operation in the public interest they need to be interpreted more precisely in the form of financial obligations for the

[5] *Vide* Acton Society Trust, *Relations with the Public*, Nationalised Industry Series, No. 12, p. 2.

[6] R. Kelf-Cohen, *op. cit.* pp. 289-90.

nationalised undertakings generally."[7]

Finally, all the Acts provide that Industries are to be run in the best interests of the nation.

The last two obligations contain an enormous amount of sense. For instance, no private producer will produce any goods for a single moment with the express intention of not making profit. He might undergo certain losses, as indeed people sometimes in business do undergo heavy losses; and again a producer might at a particular moment decide to sell certain stocks below cost price. But this should not mean that that is the ultimate policy of his firm. Therefore, elimination of the profit motive, which is the driving force under private ownership, is a significant characteristic of British nationalised industries.

The nationalised industries are also under legal obligation to work for the best interests of the nation. Interests of the nation is undoubtedly a flexible variable; it might convey more than one meaning to a private producer but it has restrictedly one meaning for a state enterprise. It covers the nation as a whole and not only those who are on the list of effective consumers of these industries. For instance, the Electricity Board is under legal obligation to think about the welfare of those people also who live in the remote corners of the country—to whom the supply of electricity was an uneconomic venture for a private producer. To provide such persons with electricity, gas and transport facilities come within the phrase 'best interests of the nation'. These so-called 'uneconomic ventures' are bound to be subsidized either directly by the State or indirectly by the rest of the community; by an increase in efficiency of the industry or collectively by all these means. Furthermore, the interests of the nation expect better service by these nationalised industries as compared to when they were under private ownership. It is clear from the face value of these obligations that they all are mostly in the interests of the consumer and the public at large.

Obviously questions arise: How is it that the consumer's rights, which everybody wants to safeguard, get endangered? Does not this mean, that the whole structure of public relations of the

[7] *Vide* The Report of the "Financial and Economic Obligations of the Nationalised Industries Committee", April, 1961, Cmnd. 1337 paras. 17-33.

public corporations is based on misunderstanding and that the consumer has unnecessarily been made over-conscious about these public industries? When consumers' welfare is the object of public industry and industry's achievements are mainly for the betterment of consumers, then why should consumers feel alarmed and agitated? There is no simple answer to these complex questions.

II

The post-war Labour Government, which undertook the task of nationalisation of large industries, believed that planning must be inspired from the consumer end if it is not to be bureaucratic and inefficient. It would not be enough for control by blind forces to be replaced by control by a few people sitting in Whitehall.[8] With the object of gaining and maintaining the goodwill and confidence of the general public the Labour Government wanted to provide an efficient public relations organisation for each nationalised industry. The various Acts, therefore, provide for some form of Consumers' Council to enable the consumers to ventilate their complaints and needs. These Councils are a unique type of instrument; neither the private enterprise nor the first generation of public corporations in Britain offers any counterpart. Only the London Passenger Transport Board Act, 1933 provided for Advisory Bodies.[9] The L.P.T.B. Act provided for a London and Home Counties Traffic Advisory Committee of about forty members representing various interests. The Chairman of the Committee was to be elected by the members from among those members, appointed by local authorities. The chief functions of the Committee were: (a) to consider, report to and advise the Minister of Transport on any matters relating to traffic within the London Traffic area; and (b) to make representations to the Board with respect to any matter connected with the services or facilities provided by the Board in this area. The Committee thus had important functions of initiation, as well as of consultation, to

[8] *Vide* Herbert Morrison, *Economic Planning: Studies in Public Administration*, Institute of Public Administration, pp. 8-9.

[9] London Passenger Transport Board Act, 1933, Schedule 12.

perform.[10] Setting aside this limited experience of the Traffic Advisory Committee, the machinery of Consumers' Council has no history to consult.

The Coal Industry Nationalisation Act of 1946 lays down that the two Consumers' Councils—an Industrial and a Domestic Coal Consumers' Council—shall consist of persons appointed by the Minister of Power to represent the Board. Discretion as to size is left to the Minister. The chairmen of the Councils are not *ex officio* members of the Board. Each of the two coal councils has two National Coal Board members, although the Statute is silent on this point. These Councils are national bodies. The Act authorises the Minister to appoint regional councils. It is observed that the two national coal councils have strongly resisted any move to set up regional councils. When, for the first time, the matter was raised the Industrial Coal Consumers' Council simply said: "The time is inopportune"; but the Domestic Council went farther, saying that the establishment of regional councils 'would involve diversion of effort from more urgent matters. . . . '[11] The staff of the councils are to be provided by the Minister with the concurrence of the Treasury. The duties of these councils include the making of representations to the Minister about the policy of the Board, and, if he feels satisfied with the soundness of their representations, he is expected to give a directive to the Board to mend their ways. The councils are obliged to make annual reports to the Minister, who lay them before the House.

The Civil Aviation Act, 1947, provides for the Air Transport Advisory Council. The Chairman of this Council is named by the Lord Chancellor, whereas in all other cases the Minister concerned is authorised to appoint the Chairmen. As a matter of fact the Minister of Civil Aviation originally envisaged this Council as a tribunal, holding public hearings and exercising quasi-judicial powers.[12] The Air Transport Advisory Council consists of five members, but the Act, because of the original desire for a tribunal, specifically bans the membership of

10 *Vide* T.H. O'Brien, "*British Experiment in Public Ownership and Control*" (London, 1937), pp. 284-91.

11 Industrial and Domestic Coal Consumers' Councils, Annual Reports for year ending 30th June, 1948, pp. 8-15.

12 E.L. Johnson, *op. cit.* p. 90.

employees or members of the Air Corporations. The Act gives no clue at all as to what the Minister may do on representations when made, but by a reporting device he is put in the position of having to give careful consideration to the recommendations. When he lays the annual report of the Council before the House of Commons, he is obliged to file a statement of action which he has taken in consequence of any recommendations submitted to him by the Council during the period covered by the Report.[13]

The Transport Act, 1947, through its Section 6, provides for the establishment of a Central Transport Consultative Committee and for Area Transport Users' Consultative Committees. Both Central and Users' Committees are appointed by the Minister and consist of an independent chairman, representatives of agriculture, commercial, industrial, shipping and labour interests and of local authorities, and members appointed from among persons nominated by the Transport Commission.

The Transport industry is the only one in which the national council has corresponding councils at the regional level. At first the Minister of Transport appointed Transport Users' Consultative Committees for Scotland and Wales, and much later eleven area committees were constituted for the whole country. These are miniatures of the Central Committee in membership, representation, organisation and duties except that the duties are of course discharged with respect to problems in the area. Although these area committees work closely with Transport's divisional managers and regional officers, and thus obviate the need for many formal recommendations, their minutes and recommendations are sent for consideration to the Central Transport Consultative Committee in London. The Transport Act does provide that the full-time officers and servants of the Consultative Committees are to be provided by the Transport Commission itself.

The Transport Act of 1947 also adapts the old Railway Rates Tribunal under the new name of the Transport Tribunal. The Tribunal has a chairman with legal experience, one member experienced in transport business and one member experienced in commercial affairs. The Tribunal can hear complaints that undue preference has been given; and reasonable facilities are

[13] Civil Aviation Act, 1947, 12, 13, 14, Geo. 6, c. 67, sec. 12, sub. sec. 9.

not provided. Complaints can be made by local authorities and associations of traders. The most significant power of this judicial body is that the charges schemes for the Commission's services have to be confirmed by the Tribunal and may be altered or reviewed on application. Objections may be made to the Tribunal by any representative of any class of persons using the services or facilities to which the scheme relates.[14]

A White Paper on 'Reorganisation of the Nationalised Transport Undertakings'[15], published in December 1960, made recommendations for the reconstitution of the transport industry. The White Paper proposed that transport should be further decentralised by the creation of separate Boards to run various activities of the B.T.C. It was proposed that each of these new bodies should have a separate financial, as well as functional, constitution and identity. These proposals were incorporated into the Transport Act of 1962. However, the structure of the consultative machinery is essentially left intact by this Act. Thus, there are still a Central Transport Consultative Committee (C.T.C.C.) and Transport Users' Consultative Committees for Scotland and for Wales and Monmouthshire, all created by the 1947 Transport Act, and nine English area Transport Users' Consultative Committees. Some changes have been introduced in the membership of the Committees. Under its new constitution, the C.T.C.C. consists of an independent chairman, the chairmen of all the T.U.C.C.'s and other members, not exceeding six, appointed by the Minister after consultation with bodies and persons likely to be affected by the work of the Committees. The T.U.C.C.'s also have an independent chairman, members (no maximum strength is prescribed) appointed by the Minister, again after consultation with bodies and persons likely to be interested, and not more than two additional members. An important feature of the 1962 Act is that

[14] The Transport Tribunal Rules, 1965 lay down the procedure to be followed before the Transport Tribunal. In its main lines the procedure is the same as that prescribed by the Transport Tribunal Rules, 1949, now revoked, but it has been modified in consequence of the provisions of the Transport Act, 1962, which abolished some of the jurisdiction of the Tribunal and provided that it should sit in two divisions. The Transport Tribunal Rules, 1954 have been made obsolete and are accordingly revoked. (S.I. 1965, No. 1687)

[15] Cmnd. 1248.

nominees of the British Transport Commission are no longer represented on the Committees, although Committees are entitled to seek expert advice from officials of the Boards if they so wish.[16]

The Transport Act of 1962 also introduces some changes in the functions of the Committees. For instance, under the original Act (1947) the Committees could consider any matter (including charges) affecting the services and facilities provided by the B.T.C., and including passenger road transport services provided by companies directly or indirectly controlled by the Commission. Those activities of the B.T.C. which the 1962 Act puts under the control of the new Holding Company (which includes passenger road transport) are those which it is thought should be operated exclusively as commercial concerns. Consequently, the T.U.C.C.'s are debarred from considering matters arising out of the services provided by these undertakings, and also by those subsidiaries of the four Boards which are similarly regarded first and foremost as commercial concerns. Of the activities of the four Boards, charging policy is placed outside the province of the Committees.

The procedure of the committees as far as the question of quality of service is concerned is that the minutes of a T.U.C.C. on any issue are sent to the relevant Board and also to the C.T.C.C., which then makes its own recommendation to the Minister. The C.T.C.C. sees its own role as "a kind of filter" through which the recommendations about "quality of service" questions from Area Committees flow, and by which the general policy of Committees can be regulated and emphasised. Having received the C.T.C.C.'s recommendations, the Minister may give directions to the Board, and these must be carried out. Under the 1962 Act the Minister can require the Boards to publish information about their future closure plans.

The Consultative Councils for electricity and gas are in many respects similar to one another, therefore, are usually studied side by side. In the Electricity and Gas industries, the Councils

[16] After the closure of the Coniston line in October 1958, when the votes of the two railway members of the T.U.C.C. resulted in a majority for closure, the railways' representatives were instructed not to vote: D.St. John Thomas, *The Rural Transport Problem* (London, 1963), p. 143, as quoted by M. Howe in *Public Administration*, Spring, 1964, p. 48.

were formed on a regional and district basis. For each Gas and Electricity Area Board there is a Consultative Council, composed of twenty to thirty members appointed by the Minister. Not less than half, nor more than three-fifths (Electricity) nor three-quarters (Gas) are appointed from a panel of persons nominated by local authority associations from members of local authorities. The remainder is appointed to represent commerce, industry, labour, agriculture (electricity only), and the general interests of consumers and other persons or organisations interested in the development of the commodity in the area. The chairmen of the Electricity and Gas Councils are *ex-officio* part-time members of the Area Boards. Originally it was considered that the chairman would be chosen first to represent the consumers and only secondarily to serve the Board, but it seems that the theory has been reversed, as is clear by the appointment of Mr. W. J. Bennett as a part-time member of the Eastern Electricity Board in March, 1948, to be followed in October by his appointment to the chairmanship of the Consultative Council.[17] A similar situation seems to have existed in the first London Electricity Board and its Council.[18]

These Councils are obliged to consider any matter affecting the service (including the variation of tariffs and the provisions of new or improved facilities) which is the subject of a representation made by a consumer, or which they think ought to be considered, and to notify their conclusions to the area board where action appears necessary. The councils are to consider and report to the Board on any matter referred to them by the Board. They can also make representations to the Board on the Board's general plans and arrangements (which must be communicated to them). Further, each council is required to submit to the Minister a scheme for appointment by the council of committees or individuals to be local representatives within the area. Gas officers are paid by the Board and Electricity staff by the British Electricity Authority. It is the responsibility of the Board in each industry to provide the councils and their district committees with office accommodation.

An Electricity Consultative Council is authorised to make its own representations to the British Electricity Authority after

[17] *Vide* First Report and Accounts, 1948-49, p. iv.

[18] House of Commons Debates, December 15, 1949, Col. 3034.

the area board has considered any reports of representations. The Central Authority, after consultation, may, if it finds that a defect is disclosed in the area board's general plans and arrangements, give directions to the area board. Further, the consultative council may make representations to the Minister on any matter arising out of its representations to the Central Authority of any defect which appears to him to have been disclosed in the Area Board's general plans and arrangements; the Central Authority then gives directions to the area boards.

An Area Gas Board enjoys greater independence and power, in relation to its Central Authority as compared to an Area Electricity Board. A Gas Consultative Council has also quicker access to the Minister. It may make representation to the Minister, after the Area Board has considered the matter, without reference to the Gas Council. Then, if it appears to the Minister, after consultation with the Gas Council, that there may be a defect in the Area Board's general plans and arrangements, the Minister refers the representations for enquiry and report to a person, appointed by himself after consultation with the Lord Chancellor. After considering the Report, he may give directions to the Area Board, sending a copy to the Gas Council.

Gas Consultative Councils *must*, and Electricity Consultative Councils *may* submit annual reports to their Area Boards which incorporate them in their Annual Reports. There is no prescribed policy as whether to admit the press and the public to the Council meetings.

The Electricity and Gas Councils have another novel type of duty: Area Boards governing the industries must inform the Councils of general plans and arrangements for exercising and performing their functions. On the basis of this information the councils may make representations to the Boards. Potentially this is the most effective power bestowed upon any council. It comes closest to admitting consumers' representatives to policy formulation or, to use Professor P. Sargant Florence and Mr. Maddick's phrase, "pre-legislative" authority.[19]

Although the provisions made for the establishment of Consumers' Councils or Committees are for the greatest possible benefit of the consumers, their provisions can be criticised

[19] P.S. Florence and H. Maddick, "Consumers' Councils in the Nationalised Industries", *The Political Quarterly*, 1953.

on various grounds. First of all, there is no uniform pattern adopted in the case of all these industries. Industries like Coal and Civil Aviation have only national councils, Electricity and Gas have regional machinery. None has a complete three tiered structure of national, regional, and local councils. Some of these councils are quite close to their industries, so much so that they can be easily influenced by the Boards, whereas others have no direct relations to their Boards but stand, rather, outside and above them, with contacts only with the Ministers.

Another apparent defect is that the Councils have no clearly defined responsibility. As the Acton Society Trust's enquiry points out: ". . . their duty is to the public, their right of appeal is to the Minister, their finances come from the Boards. They are, in fact, nobody's baby, and it is not the responsibility of any individual (except that remote figure, the Minister) to see that they run smoothly, and get the facilities and backing they may require."[20]

Furthermore, the real utility of the consumers' councils as independent effective guardians of consumers' interest has been criticised on more than one ground:

Firstly, it is a common criticism that the participation of consumers' councils in some general decisions is likely to be ineffective, due to the lack of research staff, or lack of even a staff that knows what ought to be researched into, and what evidence to use.[21] Consequently, the councils cannot hope to challenge the facts presented to them by the Boards. They are too complicated and technical. Mrs. White feels that even the staunchest advocates of the consumers' councils have some fears that the members, as non-specialists and amateurs, cannot stand up to the governing bodies of the industries, which can speak with the authority of a host of employed technicians and experts.[22]

Secondly, the consumers' councils' independence is again limited because they have to depend on the Boards and on the Ministers on many accounts: for appointment, staffing, office accommodation, governing board's representation, information

[20] Acton Society Trust, *op. cit.* p. 24.
[21] In *The Political Quarterly*, July-September, 1953, pp. 266-71.
[22] House of Commons Debates, Vol. 478, Col. 2847.

and remedial action.

Thirdly, commenting on the working of consumers' councils Professors Griffith and Street write: "In short, these various bodies have not succeeded in providing a forum for complaints by consumers. Those which are single central bodies are not constituted to perform this function. Even the electricity and gas councils, operating on a regional basis, with more localised subordinate committees or individuals, have failed to evolve a simple and well-known procedure. At present, the gas, electricity, coal and transport councils and committees are interesting as an administrative device and as a constitutional development, but of little practical value as organs of consumer representation."[23]

However, it is difficult to take sides on this subject. Much depends upon how things actually take shape. In one case things may work purely on merits while in another case they may not. Loyalties may conflict and give rise to awkward situations. Of course, the provisions of having some representation from the governing body of the industry, except in Civil Aviation, gives the agencies to be controlled or advised a foot in both camps.[24] The dependence of councils on information supplied by the experts of the Boards is also an unavoidable limitation. Although it is specifically mentioned in the Acts that Ministers and nationalised industries will supply the required information, the type, adequacy, and timing of such information are left to the discretion of the suppliers, with the exceptions of Gas and Electricity, where the Area Boards must supply general plans and arrangements for exercising and performing their functions, presumably before effectuation, because the councils are expected to make representations if they like. In actual practice, annual reports make repeated references to information freely requested and supplied.

[23] *Vide* J.A.G. Griffith and H. Street, *Principles of Administrative Law* (London, 1957), p. 315.

[24] *The Economist* (London) has charged that Electricity's arrangement for the Council's Chairman to be an *ex officio* member of the Board, for which service he receives a salary, gives a dominant voice to this officer and produces 'obsequiousness'. (*Vide* "The Consumer's Interest ?", *The Economist*, August 5,1950), p. 277.

In the light of organisational defects and other drawbacks revealed by the actual operation of consumers' councils, various suggestions have been made by different observers, which need careful study before a useful one can be adopted. But we leave the study of proposed reforms at this stage to be taken up in the latter part of this essay.

The Annual Reports and Accounts published by the nationalised industries are also of value in the work of public relations. Besides these annual reports and accounts, the Boards also produce a large variety of publications. In certain cases the regional bodies also produce certain publications. The doings of the Boards get further publicity through exhibitions, film shows and visits to works, etc.

III

Apart from the instruments discussed above, there are various other sources which are, to a large extent, influential in forming public opinion about these public industries. Nationalisation of basic industries in Britain being at the same time a move of extreme political significance, political parties, press and pressure groups, directly or indirectly affected by this development, have been investing a tremendous amount of time and money, to influence public opinion on this subject, which in turn directly reflects on the public relations of the public boards.

Soon after the War, the Labour Government was committed to a programme designed to produce basic change both in economic institutions and in the attitudes, motivations and responses of people. Impelled both by the nature of British society and by its own conviction, Labour sought to implement its programme within the context of democratic processes. However, because of its democratic and constitutional character, the Socialist Government did not have, nor did it desire to have at its command any of the resources for the mass stimulation of public opinion which have been used with such effectiveness by authoritarian regimes.[25]

Yet, under a democratic system of government, voluntary cooperation has been rendered increasingly difficult to obtain under the impact of opposition charges which tend to distort

[25] Francis Williams, *The Triple Challenge*, p. 277.

government policies and motives, and create the impression that socialist leaders were either dishonest, stupid, or both, and that public ownership of industries was unnecessary.

In early 1949 a week-end conference of Labour Party leaders agreed upon a draft of a new programme to be considered at the Annual Conference of the Party at Whitsun. Subsequently, as "Labour Believes in Britain", this became Labour's platform in the 1950 General Election. It included a long list of possible projects to be taken under public ownership. To meet this threat, an extremely well-organised and quite an expensive campaign was collectively launched by the Conservative Party and some other organised groups.[26] Obviously the purpose of launching such a campaign was to create a public opinion hostile to Labour's nationalisation plans.

Aims of Industry, Ltd., is described as a non-profit making organisation specialising in public relations, which seems to be largely defined as selling the virtues of free enterprise to the public. It originated in 1942 to warn leading industrialists that an offensive against socialism was essential if private industry were to survive. When the Labour Government started implementing its plans, Aims' activities steadily intensified.

At the cost of thousands of pounds, a panel of some 300 speakers was maintained to meet demands of various sections of the public, putting the case for free enterprise. Mobile film units were advised to travel the country, averaging three shows a day, six days a week, to factory gate audiences and the general public. The propagating machinery was particularly concentrated on organisations of young people, since the 'Aims' was convinced that that was where the 'left movement' had been most successful.

An elaborate press service was organised to provide news stories, principally for the provincial papers. News about the merits of private enterprise and the failures of public ownership and state controls have been of extra value to editors. In certain papers such stories could get free space. In some papers, anti-nationalisation stories drafted by the 'Aims' staff had been appearing under the signatures of prominent men and

[26] Rt. Hon. J. Chuter Ede's statement, House of Commons Debates, December 15, 1949, Col. 3034.

women.[27] Directors of Aims of Industry recognised that economics, and therefore, industry have always been closely linked with politics, yet the organisation was claimed to be non-political and non-party one. This was essentially to avoid violation of election rules which limited campaign expenditures. The Aims of Industry spent £150,000 on anti-nationalisation propaganda in one single year, which came to about £250 per constituency.[28]

Tate and Lyle Ltd., Britain's largest sugar refiners, actively participated in Aims of Industry's campaign. Of course, the Sugar industry was next on the list of industries to be nationalised. Anti-nationalisation propaganda on the sides of sugar packets aroused popular interest as well as resentment. The Labour Party considered that medium as a despotic attempt to force political propaganda on the public. But they could not challenge the legality of the move.

Heavy investments made on anti-nationalisation propaganda paid encouraging dividends quite rapidly. It is believed that in the General Elections of 1950 and 1951, in several close races where Conservative candidates won, it was due to intensive propaganda by Aims of Industry and by other organised groups. It is believed that many house-wives, even in working class families, voted against the Labour Government as the result of persuasion by grocers and butchers. The defeat of the Labour Party in the General Election of 1951 brought home to them that Aims of Industry's tactics were extremely successful. Ever since the mass campaign against public ownership showed attractive dividends, the opponents of public industries have never stopped making further investments in this sector through a brilliant band of writers, films and through other techniques.

In spite of this fact, neither the Labour Party nor Labour candidates in general at the General Election of 1959 harped on nationalisation tunes except with only two specific nationalisation proposals in the Labour programme—those of the Steel and Trucking industries, both of which had been brought under public ownership by the Labour Government but had subsequently been denationalised by the

[27] See H.H. Wilson, "Techniques of Pressure : Anti-Nationalisation Propaganda in Britain", *Public Opinion Quarterly*, 1951, p. 225.

[28] House of Commons Debates, December 7, 1949.

Conservatives; the Conservatives still exploited this issue. It seems that the public relations activities of business groups had a considerable influence on the outcome of the 1959 election, either by the immediate conversion of voters or, more obliquely, by spreading consciousness of the merits of private enterprise and the shortcomings of nationalisation. Some observers noticed a subtle but important distinction between the aims of business groups and of the Conservatives in their advertising campaigns. Both wished to defeat the Labour Party, which could only be done by returning the Conservative Party. But in the long run the spokesmen for private industry wished to force the Labour Party to alter its programme so that it would not threaten their interests; the Conservatives were simply concerned with building up the long-term appeal of their own party. The industrialists argued that they wanted to end the debate on nationalisation and then to get out of politics; they frequently complained that it was the politicians who were interfering with business, not the businessmen who were trespassing in politics.[29]

A new propaganda technique was employed to influence the public opinion on the eve of elections. It was widely held that the Colin Hurry referendum on nationalisation was the most original of the anti-nationalisation efforts. In the course of the referendum, which was the largest survey of public opinion since the 1935 Peace Ballot, 1,948,314 people answered questionnaires. The final results, announced five weeks before polling day, showed a substantial majority opposed to further nationalisation. The findings of the referendum were well reported in the national press. The questionnaire was drafted in such a way as to stimulate replies unfavourable to Labour policy. Interviewers further biased the results by the way in which they put the questions.

Once again Aims of Industry concentrated its efforts upon supplying news, feature stories, and cartoons, and for this it secured about 150,000 column inches of space (annually) in 900 newspapers and magazines. It was estimated that from September 1958 to September 1959, £ 1,435,000 were spent on anti-nationalisation campaigns. The groups campaigning against nationalisation were fighting on favourable ground. Despite

[29] See D.E. Butler and Richard Rose, *The British General Election of 1959* (London, 1960), pp. 241-255.

great success in electricity and gas, the nationalised industries had failed to satisfy all the high hopes with which they had been launched after the war. Justly or unjustly there was an impression that prices had risen, labour relations had worsened, and efficiency declined. The 1959 election result was favourable to the sponsors of anti-nationalisation campaigns, although, as most of them recognised, this would have been true even if they had not spent a penny.

Britain was facing really hard times before the general election of September 1964. It was a widely accepted thesis propagated by orators, intellectuals, and publicists far beyond the confines of Labour Party, that Britain, in contrast to other industrialized countries, had suffered a period of economic stagnation and social indolence which could best be rectified by government intervention. This view reflected and stimulated dissatisfaction with the nation's economic performance and frustration with many of its public services and social institutions. The Labour Party went into the election wholly committed to that thesis and determined to capitalise on those frustrations. The result of the election really depended on whether such discontents still predominated, or whether people were counting their blessings and, if they did predominate, on whether Labour's claim to have the answers carried sufficient conviction. The Labour Party proclaimed its distinctive remedies with more confidence and in more ringing tones than it had been in the habit of doing since its loss of nerve in the early 1950s. The Party's manifesto positively emphasised "Socialist Planning". There was no longer a half-defensive, half-apologetic tone about the references to that, or to public ownership. Plans proliferated: a national plan, regional plans, phased plans, costed plans, plans for this sector or for that. And with the plans was to be generated a new economic dynamic and a new sense of national purpose.

The Tories depended heavily on purely defensive slogans. But the business groups attacking nationalisation, particularly the steel companies, did not suffer from a lack of money for pre-election propaganda. The group faced a much greater possibility of a Labour government in 1964 than in 1959, and the succession of Mr. Wilson to the party leadership meant that the anti-nationalisation wing of the Labour Party had been

weakened. Public opinion in favour of nationalisation had improved.

However, the British Iron and Steel Federation announced, in November 1963, that 'the Federation is not only properly entitled, but is, indeed, in duty bound, to place openly before the British people the considered views of the industry' about public ownership. The Federation spent £ 620,000 on press advertising. Besides this, the major members of the Federation also ran their own independent efforts. The most notable advertisement, of half-page size, contained a large empty white space with a caption underneath 'The above is a full statement of the sensible arguments put forward so far for nationalising iron and steel'. Another sequence featured two talking animals, while a third displayed a Wilson-like pipe and made reference to Labour's economic 'pipe dreams'. One series asked: 'Today, the Steel Campany of Wales sells to the world... But What About Tomorrow'?

The Economic League conducted its long-term campaign on behalf of free enterprise and in opposition to forces 'subversive' of British industry by means of short training courses within factories, and by propaganda efforts outside factory gates. The League, like other pressure groups, regarded its activities as 'quite irrelevant' to elections and the views it advocated as divorced from party politics. However, there was a noticeable absence of co-ordination between anti-nationalisation propaganda and Conservative Party efforts, though the producers ostensibly shared a common opposition to Labour.[30] Yet the total expenditure of £ 3,202,000 on anti-nationalisation was an increase of more than one-half compared to 1959.

Out of this brief discussion it may be gathered how important are the public relations of the public corporations! It is no use forming any opinion about the public relations of public industries out of the working of the consumers' councils and consultative committees only. Agreed that these instruments are not in any way less important; their administrative and organisational perfection is essential for their efficient functioning. But it is clear enough that the public relations of the public corporations are the outcome of actions and

[30] See D.E. Butler and Anthony King, *The British General Election of 1964* (London, 1965), pp. 369-380.

reactions of various forces. On the one hand, the Acts of nationalised industries do not permit Consumers' Councils and Committees to spend money on advertisements except on limited subjects (*i.e.* sale of annual reports). On the other hand, a well-planned and a terribly expensive anti-public-ownership propaganda campaign by some well-organised groups and parties has been in progress since the war. Obviously the relations between the public and the public corporations could not be satisfactory.

IV

This whole discussion leads us to two very important issues: (i) Will not anti-state-ownership propaganda eventually lead us to believe that the State is the natural enemy of the consumer? (ii) Whatever the significance of Consumers' Councils might be, the question is how they might be improved as effective instruments for public welfare.

So far as our first problem is concerned, it might look at first sight a hypothetical exercise and thus of no more than academic value. But it is really a cogent question for students of political philosophy to think about quite seriously. The state has undertaken certain economic responsibilities because of various reasons, due to which the nature and significance of the State has changed. With these changes the balance of political power has been seriously disturbed. Those who have been affected foresee the eventual elimination of their power in the successful accomplishment of the reorganised "Agenda" of the State. But they have been, and are, the masters not only of opposite political philosophies but also of enormous material resources which, it seems they do not hesitate to unleash, to prove, by all means, firstly, that the economic items on the "Agenda" of the State should not be a permanent feature, secondly, if such items are retained, the State or State agencies are not fit to perform economic functions in the best interests of the society. Presently, it seems that such forces are doing their best to prove that the State or the State agencies which are responsible for operating the economic functions of the State are not fit for these tasks. Therefore, the interests of the public are not safe in their hands. Eventually this might lead the public to believe that the State, of which the consumers are members, is no good friend—it is rather the enemy of the consumer. Of

course, if trends are reliable guides, the contempt for the State might become more apparent at any time in the future. It is, really, difficult to predict the consequences of such tendencies, particularly at this stage when the British nation is passing through a period of almost full-employment. The symptoms of trouble, in fact, reveal themselves when the body politic is relatively weak and the power of resistance is meagre. Above all the tragedy is that no remedy can be offered to avoid such dangerous consequences. There is an evident clash amongst political philosophies on economic principles in which the State itself is actively involved. When fundamental political philosophies are at stake, economic gains are in danger and when the State itself is one of the institutions involved, the magnitude of actions and reactions can be well imagined! But there is nothing one can do. It is a part of the whole process—the evolution of the State.

V

Turning now to our last question: in view of big politico-economic changes, no doubt we should not expect too much from Consumers' Councils. Nevertheless they deserve due attention to make them as effective as possible. Various reforms and substitutes have been suggested to make the consumer's voice more effective than it is at present.

Early in 1948 it was suggested in the columns of "*The New Statesman and Nation*" that, with increasing socialisation, which means the substitution of State for private monopoly, there is a need for a Minister to represent the consumer.[31] The mover of the suggestion did not seem to have supported his move adequately. For instance, he did not say what should be the functions of the consumers' Minister and what should be his relations with his colleague who is constitutionally the Minister in-charge of the Board. The rest of the structure of the consumers' council was also not explained in these columns.

Later on in 1950 Professor J.A.G. Griffith suggested that 'one hierarchy of authorities should be established to represent the consumer and user of services and facilities provided by *all nationalised industries*.' At the top of this a cabinet Minister without departmental responsibilities should represent consumers'

31 "The Hungry Sheep", *The New Statesman and Nation*, January 31, 1948.

interests. The most obvious choice would be 'the Lord President of the Council'. Professor Griffith further suggested that "there should be a central consumers' tribunal and county consumers' tribunals".[32] He also explained how proposed consumers' councils and tribunals should be composed and what type of complaints should be handled by the councils, and also what type of complaints may be referred to the consumers' tribunals.

Whereas the proposed multi-purpose Central Consumers' Council and county level councils seem to be quite a constructive suggestion, and have been since then recommended by many other observers, Professor Griffith himself feels, regarding the consumers' tribunals, that there is no advantage in removing legal matters from the jurisdiction of ordinary courts, since he believes that the liability of the administering corporations in legal matters is not on a different footing from liability of private persons and private corporations.[33]

On the other hand, in the opinion of L. Freeman and G. Hemingway, the final authority to watch consumers' interests should lie in Parliament and not with the Executive. They propose that Parliament should establish a Select Committee for the nationalised industries, to look after the interests of the ordinary consumer, at national level, and for local purposes they suggest that local authorities should set up a Committee (joint or otherwise) to deal with consumer problems relating to Electricity, Gas, Local Transport and the distribution of Coal. They also suggest area committees corresponding to the main administrative units of the nationalised industries, the members of which should be drawn from local committees and not appointed by Ministers.[34] An all-party House of Commons Select Committee on Nationalised Industries as suggested by Freeman and Hemingway, seems to be absolutely different from a Select Committee, which was widely suggested and which was finally constituted for the parliamentary accountability of the public corporations. The author of the present proposal would like the proposed Select Committee to divide itself into the requisite

[32] J.A.G. Griffith, "The Voice of the Consumer", *The Political Quarterly*, 1950, pp. 178-179.

[33] *Ibid* p. 180.

[34] G. Hemingway and L. Freeman, *op. cit.* pp. 24-25.

number of sub-committees (one for each industry) to deal with those consumer problems which could only be settled at the highest level, and receive complaints from ordinary consumers which had not been settled locally.[35] We doubt very much the practicability of this proposal. First of all, the House has got neither enough technical knowledge nor sufficient time to handle all sorts of consumers' complaints. Secondly, the boards will always feel embarrassed in dealing with political representatives of the public.

The most widely recommended reform in this field is that there should be a single system of consumers' councils for all the fuel and power industries—or even for all nationalised industries.[36] The authors of this proposal by and large also agree about the lower structure of this proposed multi-purpose central consumers' council. They suggest that the national council would have, as its counterpart in each of the regions, one consumers' council to cover all the nationalised industries, which would be concerned with policies primarily regional or where some expression of regional opinion would aid the national council.[37] But there does not seem to be a general agreement on such subjects as how to staff these councils, and what should be their functions. One extreme view is that all the members of the councils should be elected by popular vote.[38] On the other hand, Professor Florence and Mr. Maddick suggest that a small number of members of the National Council must be employed full-time and should be responsible primarily over the whole field, and that each member, also, should be selected for his experience and expertise in a particular topic—such as finance, production, sales, raw materials, administration—and each might have to make a special study of a particular industry, gas, coal, electricity, land transport, aviation and so on.[39] They also propose that the council be assisted by a research unit which should consist of efficiency experts,

[35] G. Hemingway and L. Freeman, *op. cit.* p. 16.

[36] For instance, see Hugh Gaitskell in Foreword to Mary Stewart's Consumers' Council, p. 1; also see Steward, Consumers' Council; J.A.G. Griffith, *op. cit.* pp. 179-180; P.S. Florence and Hemingway, *op. cit.* p. 268.

[37] P.S. Florence and H. Maddick, *op. cit.* p. 268.

[38] Acton Society Trust, *op. cit.* p. 24.

[39] P.S. Florence and H. Maddick, *op. cit.* p. 268.

statisticians, experts on broad considerations involved and on problems of the particular corporations. The proposed regional body consisting of the chairmen of the district committees and representatives of major interests within the area would be represented on the central council by its chairman.

The idea of multi-purpose central and regional consumers' councils seems to be based on sound merits. But the proposed methods of constituting these bodies and the type of functions proposed to be entrusted to them seem to be not without serious drawbacks. Professor Florence and Mr. Maddick[40] would like to see the National Council become capable enough to adduce the Boards' attitudes and policies *vis-a-vis* the consumer, and also to provide material for purposeful discussion by the whole council. This proposed council would be empowered to investigate, as they think fit, all matters referred to it by the Ministers, by the Boards, by the Regional Consumers' Councils, or by any interested consumer or body of consumers, or to carry out any investigation which they considered desirable. The movers of the suggestion hold that on the wider problems of the Boards—for instance on pricing and policy decisions matters—the central committee would probably have to adopt the methods used by the Select Committee on Estimates in handling complex problems in organisations of same size—splitting up into sub-committees, each of which would handle a particular topic, and then reporting back. In their opinion this is the only way to convince the Minister, Parliament and the public that the problems of the nationalised industries, individually and collectively, were under unbiased review. They also believe that the proposed council would be more suitable than quasi-judicial tribunals, such as the Transport Tribunal, to examine the case for an increase in charges, and that such a council would provide a check on the efficiency of the various industries and would have the advantage of being able to compare problems which are common to all the industries.

We certainly want these consumers' councils to be really effective instruments, to interpret the consumer's point of view to the public corporations. Therefore, the suggestion of replacing the existing machinery by the proposed multi-purpose central and regional consumers' councils seems to be quite

[40] P.S. Florence and H. Maddick, *op. cit.* pp. 269-70.

reasonable, economic and practicable. These bodies should be as independent as possible, from an administrative and financial point of view. But the nature of their functions as proposed by Professor Florence and Mr. Maddick seems to be expecting too much of these councils. The councils were never intended to be professional critics of the Boards. Mr. Johnson rightly concludes that the councils cannot function as another policy proposing body, regularly drafting alternatives for the Minister's choice. They cannot, in the final analysis, block major policy moves decided upon by the nationalised industries. All this is expecting too much of the councils. It is asking them to be something they were never intended to be.[41]

We suspect that those who intend to have a rigid control over the public corporations through these consumers' councils ignore many other aspects of the problem: (a) The Boards of nationalised industries are legally devoted to the public interest. They are not natural enemies of the consumers. (b) There are certain other provisions made in all the Acts of nationalised industries to safeguard the interests of the public, *i.e.*, through parliamentary controls, and the controls by the Executive. (c) It seems to be generally ignored that the public corporations under discussion are business institutions, and business by nature cannot be run with efficiency under rigid controls. 'Business' has its own code which includes maximum freedom and flexibilities. (d) All public corporations are constantly guided by their Acts, by their supervising Ministers and above all by the policies sanctioned by Parliament. Therefore, the contribution of Consumers' Councils to serve public interests should not be judged in isolation, but in relation to the whole system of controls over the nationalised industries. Their main object is to handle consumers' complaints efficiently and effectively, but ultimate controls must rest with Parliament.

[41] Eldon L. Johnson, *op. cit.* p. 111.

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